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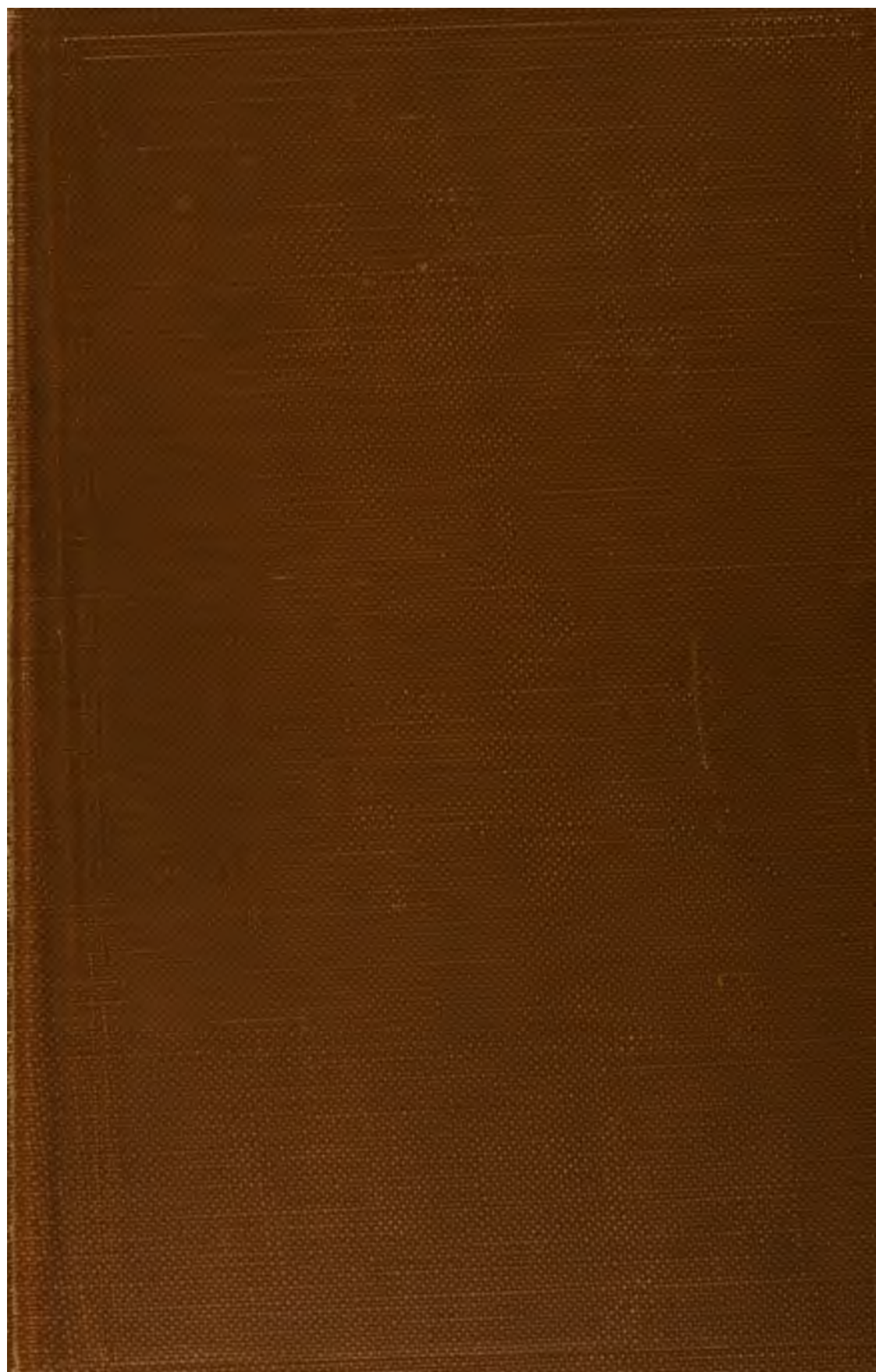
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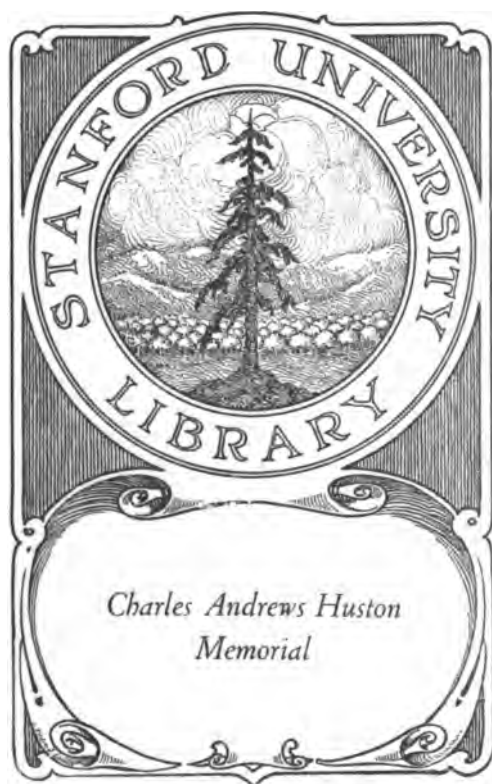
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A SELECTION OF CASES
ON
MUNICIPAL OR PUBLIC CORPORATIONS

A SELECTION OF CASES
ON
MUNICIPAL
OR
PUBLIC CORPORATIONS

BY
JOHN E. MACY, LL.M.
PROFESSOR OF LAW, BOSTON UNIVERSITY LAW SCHOOL

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PREFACE

FROM the profusion of legal agencies which has come to exist, and the increase in their activities, and especially from the contest over their constitutional position, a body of case-law has developed of an extent scarcely dreamed of by those who are not in close touch with the subject, and which is of great importance to the student. This work was undertaken about seven years ago as an endeavor to fill, in some measure, the urgent need for a book of cases upon the subject. In research, an endeavor has been made to read or consult all the reported decisions on the topics treated; and the vastness of the great maze of authorities, as well as the scarcity of good student's material among them, is almost beyond belief. Over three hundred and eighty cases were read or examined in making up the simple little section, consisting of four cases, on the establishment of a public easement (Ch. IV, § 1). The list of cases and the arrangement, as they finally here appear, have been gradually evolved during the last several years, from lists used and experimented with in the author's classes at Boston University Law School. A number of the cases which have been inserted were previously used, it will be found, in Judge Smith's collection of cases on *Selected Topics in the Law of Municipal Corporations*, which, I believe, is the only previous collection of cases on the subject; but this is due, not to any lack of research by the author, but to the nature of those cases as leading and eminent decisions which must necessarily be included in any case-book on the subject.

In the choosing of cases, those have been selected which seemed to present, in short sequences where possible, the most fundamental and basical principles. In this branch of the law — more it seems than in any other — there is danger of the student's being left unable to comprehend the question involved in an important case because of the lack of a view-point from which to grasp it, which could have been shown to him by the use of some simple case (perhaps to the teacher seeming too simple) supplying the original and most elementary problem on the principle concerned.

An abridgment has been made of the opinions of judges where it has seemed advisable to cut out extraneous questions and to concentrate the discussion upon the principle to be brought out. A great difficulty in the way of the student in reading the original reports in

governmental law is the confusing inconsistencies in the dicta and remarks of the various judges, and in their use of terms. An attempt has here been made to avoid using these inconsistent writings.

In abridging the facts of the cases, an effort has been made to avoid the most frequent criticism of case-books — namely, that they state the facts of cases in such general and meager terms as to deprive them of their greatest value to the student. The paramount advantages from case reading seem to be gained from the study and use of the facts of the cases in nearly their original concreteness. The student is thereby trained in analyzing practical situations for the purpose of extracting correctly the general legal problem involved; he is given facts for discussion so graphic that they may be impressed upon his mind and be always recollected in connection with the principle which they illustrate; he is supplied with material for observation from which he cannot very well fail to gather invaluable knowledge of the ways, dealings, and proceedings of the courts and of men and functionaries in general. The facts of the cases are as essential at least as the opinions of the courts; they are much more important in class-room discussions. By this it is not intended to advocate encouraging students to examine and remember a case simply for itself, as an isolated problem, having no value except for the mental gymnastics of reasoning about it; for undoubtedly decisions should be discussed and used principally with a view to legal generalization and the formulation or induction of principle; and it is the principle which the student should be taught to get, by extracting it accurately from the cases.

In the division of the subject, it has been thought best to avoid any classification based upon such confusing, if not questionable, terms as "public and private capacities," "governmental," "*quasi* governmental," "corporate," "business," "powers," etc.; and the arrangement made has been adopted with the intention of following the book with a text-book which can be used in connection with it.

The characters placed against the titles of cases are to signify changes made in preparing them. An asterisk (*) means that the statement of facts given has been made up or condensed either from the reporter's statement, from the judge's opinion, or from both. The dagger (†) means that the reporter's statement of facts has been omitted. The double dagger (‡) means that the case, as given, is reported only with reference to the point for which it is to be used, and that other points have been excluded. The briefs and arguments of counsel have been omitted in almost all the cases, without mention of them.

JOHN E. MACY.

BOSTON, MAY 1, 1911.

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A SELECTION OF CASES ON MUNICIPAL OR PUBLIC CORPORATIONS

CHAPTER I

DEFINITION AND NATURE

1. *Difference between Public and Private Corporations.*

BLAND, CH'R, IN *McKIM v. ODOM*

3 *Bland's Ch. (Md.)* 417. 1829

THE multitude of bodies politic, that have been created either by the government of the Province or of the Republic, most of which still subsist, may be considered, in reference to their objects, as belonging to one or other of three distinct classes.

The first kind are such as relate merely to the public police; which, by assuming upon themselves some of the duties of the State, in a partial or detailed form, and having neither power nor property for the purposes of personal aggrandizement, can be considered in no other light than as the auxiliaries of the government of the Republic; and consequently, as the secondary and deputy trustees and servants of the people. The right to establish, alter, or abolish such corporations, seems to be a principle evidently inherent in the very nature of the institutions themselves; since all mere municipal regulations must, from the nature of things, be subject to the absolute control of the government. These institutions being, in their nature, the auxiliaries of the government in the great business of municipal rule, cannot have the least pretension to sustain their privileges, or their existence, upon anything like a contract between them and the government; because there can be no reciprocity of stipulation; and because their objects and duties are incompatible with everything of the nature of such a compact.

The power of acquiring and holding property, although almost always given, is by no means a necessary incident to all corporations of this class; they may be established without any such capacity; as in the instance of the commissioners for emitting bills of credit. 1769, ch. 14, s. 6. The preservation of morals and the administration of justice are the chief ends for which government has been instituted; and infancy, insanity, infirmity, and helpless poverty have an un-

*Begin with this
+ then 16 17 18*

doubted claim upon the protecting care of the Republic. *Montesq. Sp. Laws, b. 23, c. 29.* Bodies politic of this class having these objects in view, are city corporations, 1708, ch. 7; 1796, ch. 68; Levy Courts, 1804, ch. 73; County schools of the Provincial or State government, 1696, ch. 17; 1723, ch. 19; public colleges, April, 1782, ch. 8; hospitals, 1797, ch. 102; 1816, ch. 156; trustees of the poor of the several counties, etc., 1768, ch. 29; 1783, ch. 15.

The second class of corporations are such as have no concern whatever with the duties of the Republic; nor are in any manner bound to perform any acts for its benefit; but whose only object is the personal emolument of their members. . . .

It is remarkable, that there is no instance of the creation of any body politic of this description under the Provincial government; but since the establishment of the Republic they have increased and multiplied to a very large and still rapidly growing family. The examples of this class of corporations are the insurance companies, April, 1787, ch. 20; the Free Mason societies, 1821, ch. 147; the banks, 1790, ch. 5; the manufacturing companies, 1808, ch. 49; the library companies, etc., 1797, ch. 35.

The third species of corporations partake, in many respects, of the nature of the first two classes; and are sure such as have a concern with some of the expensive duties of the State, the trouble and charge of which are undertaken and defrayed by them in consideration of a certain emolument allowed and secured to their members. In cases of this kind there are certainly many of the material features of a contract between the government and the corporation; there is manifestly a *quid pro quo*. But this contract, if it be so, is, and of necessity must be, like all others to which a government or State is a party, one of imperfect obligation as regards the State; *Vattel, Law of Nations Prelim. § 17*; and as such, subject to be dealt with by the government of the State as the public good may require, on making a just compensation for any private property which may be taken for a public use. No bodies politic of this description were ever created under the Provincial government; but since our independence, a great number of them have been called into existence; such as canal companies, November, 1783, ch. 23; bridge companies, 1795, ch. 62; turnpike road companies, etc., 1797, ch. 65.

REGENTS OF THE UNIVERSITY OF MARYLAND
v. WILLIAMS †

9 G. & J. (Md.) 365. 1838

APPEAL from Baltimore County Court. Action of assumpsit on a count for money had and received to the plaintiffs' use. The plaintiffs are a corporation, the governing body of the University of Maryland, created by an act of the General Assembly of Maryland passed in 1812; the defendant is treasurer under an act passed in 1825 purporting to abolish the plaintiffs and to create in their stead a corporation styled "Trustees of the University of Maryland." The plaintiffs seek to recover money in the hands of the defendant received and held by him for the purposes of the University.

The plaintiffs excepted to rulings of the trial court admitting in evidence the Act of 1825, against the plaintiffs' objection that it was unconstitutional, and rejecting a prayer for instructions which raised the same question. The evidence showed the following:

In 1812, an act was passed, "For founding an University in the City or Precincts of Baltimore." It authorized "The College of Medicine of Maryland" (a corporation chartered in 1807 for the promotion of medical knowledge), to establish the three other departments; namely, the faculty of divinity, the faculty of law, and the faculty of the arts and sciences; and declared "that the four faculties or colleges thus united shall be, and they are hereby, constituted an University, by the name and under the title of the 'University of Maryland.'" The members of the four faculties, and the Provost of the University, and their successors, were declared to be one corporation and body politic, to have continuance forever by the name and style of "Regents of the University of Maryland:" with capacity to acquire, enjoy and dispose of real and personal estate for the purposes and interests of the University; the Regents were empowered to appoint the Provost, and each faculty was to appoint its own professors and lecturers. The act provided further "that the professors now appointed and authorized in the College of Medicine of Maryland and their successors, shall constitute the faculty of physic; that the professor of theology, together with six ordained ministers of any religious society or denomination and their successors, shall form and constitute the faculty of divinity; that the professor of law, together with six qualified members of the bar, and their successors, shall form and constitute the faculty of law; and that the professors of the arts and sciences, together with three of the principals of any three academies or colleges of this State, and their successors, shall form and constitute the faculty of the arts and sciences."

The Regents were authorized to make regulations for the govern-

ment and discipline of the University, to vacate by certain proceedings the seat of the Provost of the University; to grant diplomas and certificates of admission to the medical profession, to confer degrees, to sue and be sued, to have a common and a privy seal.

The Act of 1825 recognized the existence of the prior corporation and stated that the good government and discipline of the University required important alterations in the act of incorporation. It purported to discontinue and abolish the board of Regents, and the members of its several faculties (declaring that the faculties should consist of professors alone), to appoint a number of persons by name to be known by "the corporate title of trustees of the University" of Maryland; to invest them with all the powers and privileges before belonging to the corporation of the regents, with power to elect officers and professors, and to make by-laws for the regulation and discipline of the institution; declared that the Governor of the State should be *ex-officio* president of the board of trustees; that all the pecuniary concerns of the University should be under the control and direction of the trustees; that all the rights of property then possessed by the regents should vest in the trustees; that vacancies occurring in the board of trustees should be filled up by the Executive of the State; and it professed to repeal all such parts of the act creating the corporation of the Regents of the University, as were inconsistent therewith.

Evans, Mayer, Martin, and Meredith, for the appellants.

Nelson and R. Johnson, for the appellees.

BUCHANAN, C. J. [After holding that the Act of 1812 did not violate any vested right, because none was created by the prior acts, and proceeding to inquire whether the Act of 1825 was constitutional:]

The next subject of inquiry is, whether the corporation of "The Regents of the University" [created by the Act of 1812] is a public or a private corporation; if at this day, that can be considered an open question.

A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government, subject to the control of the legislature, and its members officers of the government, for the administration or discharge of public duties, as the cases of cities, towns, etc.; so where a bank is created by the government for its own uses, and the stock belongs exclusively to the government, it is a public corporation; and so of a hospital created and endowed by the government for general purposes of charity.

The corporation of the University has none of the characteristics of a public corporation. It is not a municipal corporation. It was not created for political purposes, and is invested with no political powers. It is not an instrument of the government created for its own uses, nor are its members officers of the government, or subject to its control

See also
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in the due management of its affairs, and none of its property or funds belong to the government. The State was not the founder, in the sense of that term as applied to corporations. It was the creator only, by means of the act of incorporation, and may be called the incipient not the perficient founder. It gave to it in its creation the capacity to acquire and to hold property, but made to it no donation; and whatever property the corporation has, is its own, to be managed and disposed of by the Regents for the uses of the institution, in such manner as they may judge most promotive of its interests, and not for the uses of the government, nor in the exercise of any political powers, but as the trustees merely for the University. It is said there have been subsequent endowments by the State. If it be so, that cannot affect the character of this corporation. If eleemosynary and private at first, no subsequent endowment of it by the State could change the character, and make it public. But it nowhere appears that any such endowments have been made. Several Acts of Assembly were passed, authorizing money to be raised by lottery for the use of the University; and by the Act of 1821, ch. 88, certificates of five per cent stock of the State were authorized to be issued by the treasurer, to the amount of \$30,000, to be appropriated to the payment of the debts of the institution; the medical professors of the University being required to enter into bond for the annual payment of interest on that sum, which can scarcely be called endowments. The authority to raise money by lottery certainly was not; it was a mere privilege granted, which cost the State nothing; and the appropriation of the \$30,000 to the liquidation of the debts of the institution, on the payment of interest by the professors of one of its faculties, assumes more properly the shape and character of a loan to a private corporation for its own private purposes, than of an endowment or appropriation of money for the uses or political purposes of the government. . . .

But it has been urged in argument at the bar, that whenever the end is public, the franchise granted to effect that end is also public. That here, the end was the preservation of life and health, which depend upon the skill of those who minister to the sick, etc., a public end in which the whole public have an interest, and therefore that this corporation is public. . . .

It is not enough to say that the public has an interest in the skill and learning of physicians and surgeons. The public has a deep interest in the dissemination of learning and useful knowledge, and so it has in the beneficial results to the community of insurance, canal, railroad, and turnpike companies, etc. The uses or objects may, in a certain sense, be called public; but the corporations as distinguished from the uses or objects are private.

The objects for which almost if not all corporations are created are such as the government deems it expedient to promote, upon the supposition that they will be beneficial to the public; and these expected

benefits constitute the chief, and usually the only, consideration of the grants.

The distinction is between the franchise granted, and the expected beneficial results to the community from the possession and exercise of the franchise, upon the performance of the implied condition of the grant to exert the rights acquired in a manner suited to the promotion of the objects proposed. The institution, the bank, canal, railroad, college, etc., from the nature of its particular object, and the interest the public has in that object, may, and commonly does, acquire in a popular sense the character of a public institution; but the corporation, the artificial being composed of natural persons for the management of the affairs of the institution, in contemplation of law, is private; as much so as the individuals composing it were before the act of incorporation imparted to them an artificial existence, with power to take and hold property in that particular form, and for particular purposes; which is all the act of incorporation does, and that only because the particular objects can best be effected in that particular form. But not therefore making the artificial being or corporation an instrument, nor the persons composing it members, of the civil government of the country.

Supposing an association of private individuals had contributed funds in real or personal property, for the establishment and conduct of this very University (which, in legal understanding, would be a private charity), and had appointed professors, and constituted them governors and managers of the institution, and of the appropriated funds; the objects being the same as now, the promotion of religion, and the dissemination of scientific, literary, and medical knowledge, and the interests of the public in those objects the same; could the governors so appointed be considered public officers, or members of the civil government? and if not, why should the artificial being created by law, and composed of the same persons for the same purposes, thereby become a part of the civil government, and a public corporation? A private charity cannot, by a mere act of incorporation, be made a public one. In the language of Lord Hardwicke, "the charter of the crown cannot make a charity more or less public, but only more permanent than it would otherwise be," 2 *Atk. Rep.* 88, and that is the settled law upon the subject.

Again, "a charity may be public, though administered by a private corporation; and to hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions from the time of Lord Coke." 2 *Kent's Com.* 273.

Public corporations are to be governed according to the laws of the land, and the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises. That is of the essence of a public corporation.

But it has no such right in relation to eleemosynary corporations, or the management of their affairs. That belongs to the visitors alone, under the visitatorial power incident to such corporations. . . .

That a charter or act of [private] incorporation, when accepted, is a contract, is a proposition too self-evident and universally assented to, to be drawn in question, or to require the aid of argument or authority to support it. . . .

The Act of 1812, then, incorporating the Regents of the University of Maryland, being by acceptance a contract between the State and the corporation, the organization and continuing existence of which have been recognized by various subsequent acts of the legislature, is it a contract protected by that clause of the Constitution of the United States, which declares that "no State shall pass any law impairing the obligation of contracts"? This question would seem to have been fully settled by the decisions in the cases already cited of *Dartmouth College v. Woodward* [4 Wheat. 518]; *Allen v. McKeen* [1 Sumner 276] and *The Society, etc., v. New Haven*. . . .

*Judgment reversed, and procedendo awarded.*¹

¹ In *Head v. Curators of University of Missouri*, 47 Mo. 220 (1871), an act had been passed terminating the offices in the university, and providing for a new election. In holding that the university was a public corporation, and that the act was constitutional, the court (Currier, J.) said: "Whether the university and its affairs are subject to the direction and control of the Legislature, depends upon its character as a corporation, whether public or private. If it is a private corporation, the Legislature has no control over its internal management. On the other hand, if it is a public corporation — a State institution — it is subject to the discretionary control of the law-making department of the State government.

"The university is clearly a public institution, and not a private corporation. It was established by an act of the Legislature, which was passed February 11, 1839 (*Sess. Acts* 1838-9, 176). The act commits the government of the institution to a board of fifteen curators. The curators were not named in the act, but provision was made for their election by a joint vote of the senate and house of representatives. They were removable at the pleasure of the Legislature, and had no power to appoint their successors. (*Sess. Acts* 1838-9, 176, §§ 1-3.)

"There are no named grantees in the act, and consequently no parties either to accept or reject the grant. In a word, the State entered into no compact with private parties. The State established an institution of its own, and provided for its control and government through its own agents and appointees. The act creating the institution, in its first section, declares that a 'university is hereby instituted in this State, the government whereof shall be vested in a board of curators.' The university is then (§ 2) declared a 'corporation and body politic' and invested with certain powers. These powers are given into the hands of a board which is made subject to the pleasure of the Legislature. This is not the way in which a private corporation is brought into being and endowed with corporate franchises. A private corporation involves the idea of private parties and private rights. No such parties or rights were concerned in the institution of the University of the State of Missouri. By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for educational purposes — a State university. (*A. A. on Corp.* §§ 31-36; 5 Stew. & Port. Ala. 17; *University of North Carolina v. Maulsby*, 8 Ired. 257; *Bush v. Shipman*, 4 Scam. 190.)

"The Legislature by an act passed February 8, 1839 (*Sess. Acts* 1838-9, 184), appointed a board of commissioners to locate the university, and receive grants of land, as also bids from certain named 'counties and from the citizens thereof for such sums of money' as might be offered to secure the location of the institution. Under this act, as the case shows, 'private citizens of Boone county subscribed the sum of \$108,000; and Columbia College, by its board of trustees, subscribed the buildings and apparatus, valued at \$10,000, to the building fund of said university.' It further appears that the university was located in Boone county, in 'consideration' of the above mentioned subscriptions. In other words, the parties named contributed a

2. *Legal Status of Public Corporations*UNITED STATES v. BALTIMORE AND OHIO RAILROAD
COMPANY * 2145, 144, 130, 137

17 Wallace (U. S.), 322. 1872

ERROR to the Circuit Court for the District of Maryland.

In 1854, the Legislature of Maryland gave to the city of Baltimore, which desired to aid the Baltimore and Ohio Railroad Company in the construction of its road, authority to issue bonds to the extent of \$5,000,000, payable in 1890; and to lend the proceeds to the railroad company after deducting ten per cent for a sinking fund. The city issued its bonds accordingly, and the railroad, to secure the payment of the bonds and interest on the money lent, gave a mortgage to the city on all its road, revenue, and franchises.

The 122d section of the Internal Revenue Act of 1864, as amended by that of 1866, provided "that any railroad, canal, etc., company indebted for any money for which bonds or other evidence of indebtedness have been issued . . . upon which interest is stipulated to be paid . . . shall be subject to and pay a tax of 5 per centum on the amount of all such interest . . . whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable. . . . And such companies are hereby authorized to deduct and withhold from all payments on account of any interest . . . due and payable, as aforesaid, the tax of 5 per centum. . . ."

The United States claimed a tax of five per cent from the company, which they alleged the company was bound under the aforesaid act to withhold from the interest payable to the city and pay to the United States. The company refused to pay the five per cent to the government, on the ground that the tax was not a tax laid on *it*, the company, but one laid on the creditor, the city of Baltimore; and that because the city was a municipal corporation, its revenues could not be taxed by the Federal government.

The United States brought this action against the company in *assumpsit*. The defendant pleaded the general issue, and judgment was given below for the defendant. The United States then brought this writ of error.

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, for the plaintiff in error.

liberal bonus to secure the location of an existing State institution in their county. But these contributions to the building fund did not constitute the contributors founders of the university. Nor did the contributions alter the 'nature of the foundation, or change the character of the corporation.' *University, etc., v. Maulsby, ubi supra*. Between this and the Dartmouth College case and the cases following that decision there is a broad distinction — namely, the difference that exists between a public institution of the State and a private corporation."

Messrs. J. H. B. Latrobe and I. N. Steele, contra.

Mr. Justice HUNT. [After holding that the tax involved in this case was a tax upon the creditor, and not one upon the corporation, which was merely made use of as a convenient means of collecting the tax.]

The creditor here is the city of Baltimore, and the question then arises whether this tax can be collected from the revenues of that municipal corporation.

There is no dispute about the general rules of law applicable to this subject. The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence the beginning of such taxation is not allowed on the one side, is not claimed on the other.

In the "Compendium of Internal Revenue Law," by Davidge & Kimball (p. 505), it is said, "Congress may not tax the revenues of a State," and also (p. 425), "A national bank is not liable under the internal revenue laws to the tax upon dividends due a State on stock owned by the State."

Again (p. 471), "The term corporation as used in the acts of Congress touching internal revenue does not include a State, consequently the income of the State of Georgia from the Western and Atlantic railroad, property owned, controlled, and managed by that State, has not been made by law a subject of taxation."

Again: "The term person as used in §§ 9 and 44 does not include a State. The receipts or certificates issued by the State of Alabama are not subject to the tax of 10 per cent imposed by the Act of Congress of March 25th, 1867." 12 Opinions of the Attorneys-General, 176.

The inquiry then arises, what is the nature and character of municipal corporations, and what is their connection with the government of the State.

A work on corporations (*A. & A. on Corp.* § 16 *et seq.*) says, that inferior and subordinate communities, *imperia in imperio*, such as cities and towns, . . . are allowed to assume to themselves some of the duties of the State in a partial or detailed form, but having neither property nor power for the purposes of personal aggrandizement, they can be considered in no other light than as auxiliaries of the govern-

ment, and as the secondary deputies and trustees and servants of the people. . . .

A municipal corporation like the city of Baltimore is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. . . . As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation. This proposition is very properly admitted by the counsel for the government. In their brief it is said, "We admit that municipal corporations, acting merely within the scope of their duties as such, are not to be included within general words imposing taxes upon persons or corporations." In support of this view is cited the proviso to the amendment in 1866, in these words: "Provided that it is the intent hereby to exempt from liability to taxation such State, county, town, or other municipal corporation, in the exercise only of functions strictly belonging to them in their ordinary governmental and municipal capacity."

Assuming for the argument that this qualification is well made, let us look at the facts of the case before us. [His Honor here rehearsed the authorization by the legislature, and the other facts of the case.]

That the State possessed the power to confer this authority upon the city, we see no reason to doubt. (*Gelpcke v. Dubuque*, 1 Wall. 202; *Rogers v. Burlington*, 3 Wall. 664.)

Was it exercised for the benefit of the municipality that is in the course of its municipal business or duties? In other words, was it acting in its capacity of an agent of the State, delegated to exercise certain powers for the benefit of the municipality called the city of Baltimore? Did it act as an auxiliary servant and trustee of the supreme legislative power? The legislature and the authorities of the city of Baltimore decided that the investment of \$5,000,000 in aid of the construction of a railroad, which should bring to that city the unbounded harvests of the West, would be a measure for the benefit of the inhabitants of Baltimore and of the municipality. This vast business was a prize for which the States north of Maryland were contending. Should it endeavor by the expenditure of this money or this credit to bring this vast business into its own State, and make its commercial metropolis great and prosperous, or should it refuse to incur hazard, allow other States to absorb this commerce, and Baltimore to fall into an inferior position? This was a question for the decision of the city under the authority of the State. It was a question to be decided solely with reference to public and municipal interests. The city had authority to expend its money in opening squares, in widening streets, in deepening rivers, in building common roads or railways. The State could do these things by the direct act of its legislature, or it could empower the city to do them. It could act

directly or through the agency of others. It is not a question to be here discussed, whether the action proposed would in the end result in the benefit of the city. It might be wise, or it might prove otherwise. The city was to reap the fruits in the advanced prosperity of all its material interests, if successful. If unsuccessful, the city was to bear the load of debt and taxation, which would surely follow. The city had the power given it by the legislature to decide the question. It was within the scope of its municipal powers.

This advance of the city bonds was not a donation. It was an investment supposed to be judiciously made and adequately secured. It was not for the individual benefit of those managing the business. No one received advantage except as he was a citizen or his property was within the city. It was not a loan for the benefit of the railroad; it was for the benefit of the city solely. That the railroad company was also benefited did not affect the purpose of the transaction. . . .

We admit the proposition of the counsel, that the revenue must be municipal in its nature to entitle it to the exemption claimed. Thus, if an individual should make the city of Baltimore his agent and trustee to receive funds, and to distribute them in aid of science, literature, or the fine arts, or even for the relief of the destitute and infirm, it is quite possible that such revenues would be subject to taxation. The corporation would therein depart from its municipal character, and assume the position of a private trustee. It would occupy a place which an individual could occupy with equal propriety. It would not in that action be an auxiliary or servant of the State, but of the individual creating the trust. There is nothing of a governmental character in such a position. It is not necessary, however, to speculate upon hypothetical cases. We are clear in the opinion that the present transaction is within the range of the municipal duties of the city, and that the tax cannot be collected.

Judgment affirmed.

Mr. Justice BRADLEY concurred on other grounds.

Mr. Justice CLIFFORD (with whose dissent and views concurred Mr. Justice MILLER), dissenting:

I dissent from the opinion and judgment of the court.

Property owned by a municipal corporation and used as means or instruments for conducting the public affairs of the municipality may not be subject to Federal taxation, as it may perhaps be regarded as falling within the implied exemption established by a recent decision of this court. (*The Collector v. Day*, 11 Wall. 113.)

Well-founded doubts, however, may arise even upon that subject, as the tax in that case was levied directly upon the salary of a judicial officer, and the opinion of the court is carefully limited to the case then before the court. But concede, for the sake of the argument, that the means and instruments for conducting the public affairs of the municipality are entitled to the same exemption from such taxa-

tion as the revenues of the State, it by no means follows that the private property owned by such a corporation, and held merely as private property in a proprietary right, and used merely in a commercial sense for the income, gains, and profits, is not taxable just the same as property owned by an individual, or any other corporation. Such a right is one which may be of great value to the government in time of war and imminent public danger, and one which the United States ought never to surrender.

X Corporations of the kind are very numerous and they may and often do own large amounts of bank stock, bonds, and stocks of railroads, vacant lots and other real estate of great value, and many other species of personal property and choses in action never used or intended to be used as means or instruments for conducting the public affairs of the municipality, and in respect to all such property the right of Congress to pass laws subjecting the same to taxation with the property of the citizens generally is as clear, in my judgment, as it is that the power to lay and collect taxes, duties, imposts, and excises is vested by the Constitution in the national legislature. *McCulloch v. Maryland*, 4 Wheat. 434; *Louisville v. Commonwealth*, 1 Duvall, 295; *National Bank v. Commonwealth*, 9 Wall. 353; *Veazie Bank v. Fenno*, 8 id. 533.

It was decided by this court, in the case of *Vidal v. Girard's Executors* (2 How. 127), that the corporation of the city of Philadelphia had the power under its charter to take real and personal estate by deed and also by devise, inasmuch as the English statute which excepted corporations from taking such properties in the former mode was not in force in that State; that where a corporation has this power it may take and hold property in trust in the same manner and to the same extent as a private person may do, even though the trust is not strictly within the scope of the direct purposes of the charter of the municipality.

Ten years later this court affirmed that same rule in the case of *The Executors of McDonogh v. Murdoch* (15 How. 367), which gave \$3,000,000 to the city of Baltimore and more than a half million of dollars to the city of New Orleans. Both of those corporations, it was held in that case, were empowered to take the property by devise, as the laws of the respective States do not prohibit such dispositions of property in their favor, affirming the principle that such corporations may take real and personal estate by deed or devise, and that they hold such property in trust in the same manner and to the same extent as private persons, and the statistics will show that such corporations have become the grantees or devisees of vast amounts of personal and real estate, and that many of them still hold and enjoy the same for the income, rents, and profits.

Apply the rule here suggested to the case before the court and it is clear, whether it be held that the tax was levied upon the municipal

corporation or the railroad company, that the judgment should be reversed.

Judgment affirmed, in accordance with the opinion of the majority of the court.

PEOPLE OF THE STATE OF NEW YORK v. INGERSOLL *

56 N. Y. 1. 1874

THIS action was brought by the State of New York against Tweed, Woodward, Ingersoll, and Garvey, to recover money fraudulently obtained from the treasury of the county of New York. The plaintiff alleged in substance that the defendants, in pursuance of a fraudulent conspiracy among themselves and with others, public officers, made various fictitious claims and accounts against the county of New York, procured an issue of bonds by the said county, secured the appropriation of the money thereby obtained by the county to the payment of the said fictitious and fraudulent claims, and divided the proceeds among themselves and others. The defendant Ingersoll demurred, upon the ground, among others, that the plaintiff had no legal capacity to sue to recover this money. The State appealed from an order sustaining the demurrer.

Charles O'Connor, Samuel J. Tilden, and Wheeler H. Peckham for the appellants.

William Fullerton, Elihu Root, and David Dudley Field, for the respondents.

ALLEN, J. . . . The party to maintain an action for a tort or wrong to property must be one whose property rights have been tortiously interfered with or invaded — one who, as trustee, special property man, bailee, or general owner, has been pecuniarily damaged. The State cannot, any more than an individual, have a civil action for the recovery of money, whether by way of damages for fraud or other wrong, the wrongful conversion of chattels, or for money received by and in the possession of others, except upon proof of title and ownership. A distinction is to be observed between actions by the people or the State, in right of the prerogative incident to sovereignty, and those founded on some pecuniary interest or proprietary right. The latter are governed by the ordinary rules of law by which rights are determined between individuals. . . . Whatever other remedies the people may have to redress or punish this wrong, no precedent has been referred to for the maintenance of a civil action by the people to recover either the money lost or for compensatory damages, without proof of a right in the State as a political and corporate entity to the

money as owner, and which would give it a place in the treasury of the State when recovered, or for some pecuniary damages sustained by the State, the compensation for which would of right belong to its treasury. The people, by the complaint, claim as owners, and do not seek to reclaim the money and compel its appropriation to any particular use or purpose. . . .

Corporate capacity is conferred upon each county in the State, and New York is not excepted, to sue and be sued, to purchase and hold lands within its limits, for the use of its inhabitants; to make contracts and possess personal property, and to dispose of and regulate the use of its corporate property; and all suits and proceedings by and against a county in its corporate capacity are directed to be in the name of the board of supervisors of such county, that serving *pro hac vice*, as the corporate name. (1 R. S. 364, §§ 1-3; *id.*, 384, §§ 1, 2; 2 *id.*, 473, §§ 92, 95; *Supervisors of Onondago v. Morgan*, 2 Keyes, 277.) Counties are public, as distinguished from private corporations, and they are political as auxiliaries to the government of the State, and they are trustees of the people, the inhabitants within their county. (*North Hempstead v. Hempstead*, 2 Wend. 109.) They are sometimes called *quasi* corporations, because not in terms declared by statute to be corporations, and have a corporate capacity only for particular specified ends. But so long as they are invested with corporate attributes, even if it be *sub modo*, the distinction is without a substantial difference within the limits of the corporate powers conferred. (2 *Kent's Com.* 278, 279; *A. & A. on Corp.* § 23.) . . .

The credit of the county, with granted power to use it, supported by the power of taxation delegated by the State, is a corporate right, and the fruits and avails of that credit, when exercised by the borrowing of money, are as much the property and rightfully belong to the treasury of the county as if the specific sum had been granted in terms and paid from any other source. In political and governmental matters the municipalities are the representatives of the sovereignty of the State, and auxiliary to it; in other matters, relating to property rights and pecuniary obligations, they have the attributes and the distinctive legal rights of private corporations and may acquire property, create debts, and sue and be sued as other corporations; and in the borrowing of money and incurring pecuniary obligations in any form, as well as in the buying and selling of property within the limits of the corporate powers conferred, they neither represent nor bind the State.

The relation of principal and agent does not and cannot exist, for obvious reasons, between the State and the various municipal corporations created with power to contract debts, in respect to the exercise of the corporate functions. Debts contracted by municipalities, by authority of the legislature, are contracted by them as principals and not as agents of the State. . . .

Judgment affirmed.

COUNTY OF ST. CHARLES v. POWELL *

22 Mo. 525. 1856

ACTION by the county, commenced April 19, 1855, upon a bond executed to it by the defendant which became due February 5, 1842. The defendant relied in his answer on the statute of limitations of this State, the period of which is ten years. At trial, the court held that the debt was barred by the statute of limitations, and gave judgment for the defendant. The county appeals.

C. C. Whittelsey and T. Cunningham, for appellant.

J. Coalter and Alexander for respondent.

LEONARD, J. In 6 Bacon's Abr. tit. "Prerogative," E. 5, it was said that when a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king should not be bound, unless the statute is made by express words to extend to him. It is upon this principle that, by the English common law, statutes of limitations do not apply to actions brought by the crown, unless there be an express provision including it; and Story (*United States v. Hoar*, 2 Mason, 312) after referring to the reason given by *Blackstone* (1 Com. 247), says that the true reason of the king's prerogative, *nullum tempus occurrit regi*, is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss by the negligence of public officers. But whatever the reasons of the prerogative may have been, it was originally adopted, it is believed, in all the American States governed by the common law. It seems, however, to have had no place in the Roman law of the prescription of actions, except to enlarge the time within which the public authorities, both general and local, were required to bring their suits. (1 *Mackelvey's Civil Law by Kaufman*, 200, 202.) The new French code, expressly renounces it (Civil Code, § 2227); and our own State has recently done so too. (Practice Act, 1849, art. 2, § 10.)

The immunity, however, it seems, was, even at common law, an attribute of sovereignty only, and did not belong to the municipal corporations or other local authorities established to manage the affairs of the political subdivisions of the State. It was so expressly held in the *Lessee of the city of Cincinnati v. First Presbyterian Church* (8 Ohio, 309), and in *Armstrong v. Dalton* (4 Dev. N. C. 569); and we are not aware of any case to the contrary. In *Marion County v. Moffett* (15 Mo. 604), the omission of a public functionary to do an act required by law for the security of the public interest, was not allowed to operate as a release of the security; but the decision had nothing to do with the application of the statute of limitations to cases of that character.

The money here sued for belonged to the county and not to the State at large. It was vested in the county by a legislative donation — impressed, it is true, with a trust for local improvements; but yet it belonged exclusively to the county, although for local and not for general purposes. . . .

The judgment is affirmed.

CHAPTER II

CREATION

1. *Legislative Power to Create and Alter*

BERLIN v. GORHAM †

34 N. H. 266. 1856

ASSUMPSIT; to recover for supplies furnished for the support of Jeremiah Harding, and his wife Nancy Harding, alleged to be paupers having their settlement in Gorham.

The plaintiffs gave evidence that when Gorham was incorporated, on the 18th of June, 1836, Jeremiah Harding resided and had his home in the place which was incorporated into that town. The court ruled that if he so resided, he would thereby gain a settlement in Gorham, although no legal town meeting was holden, and though no town officers were chosen, before his removal.

The defendant excepted to the foregoing ruling, and moved that the verdict returned for the plaintiffs be set aside.

Bellows & Fletcher, for defendant.

G. C. Williams, for plaintiff.

BELL, J. By the statute of 1828 (Laws. Ed. 1830, p. 301), relating to the settlement of paupers, which is re-enacted without material change in the Revised Statutes, ch. 65, s. 1, cl. 6 (Comp. Stat. 157), "all persons, dwelling and having their homes in any unincorporated place at the time when the same shall be incorporated into a town, shall thereby gain a settlement therein." It was objected that to make an incorporation of a town effectual, there must be a legal town meeting holden in it; and as the pauper, though he resided in the town at the passage of the act, removed before any meeting was holden, he did not gain a settlement. This objection rests upon the idea that the rule which applies in the case of private corporations, that the act is ineffectual until it is accepted by the corporators, governs also the case of public corporations, like towns. See *A. & A. on Corp.* 68.

But there is no such rule in the case of public corporations of a municipal character. The acts of incorporation are imperative upon all who come within their scope. Nothing depends upon consent, unless the act is expressly made conditional. No man who lives upon the incorporated district can withdraw from the corporation, unless by a removal from the town; and by the mere passage of the law the

town is completely constituted, entitled to the rights and subjected to the duties and burdens of a town, whether the inhabitants are pleased or displeased. The legislature has entire control over municipal corporations, to create, change, or destroy them at pleasure, and they are absolutely created by the act of incorporation, without the acceptance of the people, or any act on their part, unless otherwise provided by the act itself. *The People v. Wren*, 4 Scam. 269; *Warren v. Mayor, etc. of Charlestown*, 2 Gray, 104; *Mills v. Williams*, 11 Ired. 558; *The State v. Curran*, 7 Eng. 321; *Fire Department v. Kip*, 10 Wend. 267; *The People v. Morris*, 13 Wend. 337. . . .

Judgment on the verdict.

2. Legislative Power to Invest with Governmental Authority

Enactment
of Law

PEOPLE, *ex rel.* COX *v.* JUSTICES OF THE COURT OF SPECIAL SESSIONS

7 Hun (N. Y. Supreme Ct.), 214. 1876

CERTIORARI to the Court of Special Sessions to review the conviction of the plaintiff in error of a misdemeanor.

DANIELS, J. The relator was tried, convicted, and sentenced to imprisonment for the period of one month in the penitentiary, for keeping and offering for sale watered and adulterated milk. The act charged against him was a violation of section 45 of the sanitary code, adopted and promulgated by the board of health of the city of New York.¹ By that section of the code it was declared "that no person shall have at any place where milk, butter, or cheese is kept for sale, nor at any place offer or have for sale, nor shall any person bring or send to said city any unwholesome, watered, or adulterated milk, or milk known as swill milk, or milk from cows or other animals that, for the most part, lived in stables," etc.

It is not claimed in behalf of the relator, that the act charged against him was not a violation of the terms of this section of the sanitary code. But it is objected that the board of health could not be constitutionally empowered to enact it. If the legislature could confer such authority on the board, ample reason exists for concluding that it has been done, for by section 82, article 11, of chapter 335 of the Laws of 1873, it was provided that, besides conforming the existing

¹ Under the statutes (*Laws of New York*, 1873, ch. 335, §§ 25, 80), the board was a department of the city organization, and its members were appointed by the mayor with the consent of the board of aldermen.

sanitary ordinances to its provisions, the board should also be "authorized and empowered to add to such sanitary code from time to time, and shall publish additional provisions for the security of life and health in the city of New York, . . . which shall be published in the City Record. Any violation of said code shall be treated and punished as a misdemeanor, and the offender shall also be liable to pay a penalty of fifty dollars, to be recovered in a civil action in the name," etc.

The propriety of such an ordinance as that which the board has enacted is so evident as to be clearly within the power contained in this section of the charter. It was necessary for the protection and preservation of the health of the inhabitants of the city. A more wholesome regulation could hardly have been devised or adopted, and it should be sustained and enforced by the courts, unless the board were deprived of the power to prescribe it, by some constitutional disability. The objection seems to be, that it involved such an exercise of legislative power as had been exclusively confided to the senate and assembly. Several adjudicated cases were cited and relied upon as maintaining that position, but an examination of them will at once show that they result in no such conclusion. *Hart v. Mayor of Albany*, 3 Paige, 216; *Aiken v. Western R. R.*, 20 N. Y. 370; *Corning v. Greene*, 23 Barb. 33; *Bacon v. Robertson*, 18 How. (U. S.) 480; *People v. Albertson*, 55 N. Y. 50. Neither of these cases contains anything which would justify a denial of the authority exercised in this instance by the legislature. It is an authority which for many years has been exercised by legislative bodies in this country and in England and it results from, and is incidental to, the power to create and maintain municipal organizations. The power to enact and enforce ordinances has always formed an essential feature in the creation of those corporations, and the Constitution contains nothing restricting its exercise to any particular part of the municipal body. It may be conferred upon the mayor and common council, or the latter body alone, or any other department of the municipal government, as may appear to be most just and expedient in the judgment of the legislature. That is a necessary result of the plenary authority secured by the Constitution to the legislature. Under that instrument the power exists to create and maintain bodies of that character; and how it may be most judiciously done, what authority over their inhabitants they may have, and how it may best be exercised, are matters that must necessarily be confided to the judgment of the legislature. It had the power to authorize the city of New York to enact ordinances from time to time, as might appear to be necessary for the promotion, preservation, and protection of the public health, and as the constitution nowhere required that the authority should be given to the common council, the legislature was at liberty to deposit it elsewhere. Its authority to enact laws where the constitution has not restrained it was complete

and ample (*Leggett v. Hunter*, 19 N. Y. 445, 463), and as its power in this respect had not been limited, that was sufficient to warrant the delegation of the power to enact this ordinance, to the board of health. It was empowered as a department of the municipal government to enact this and other ordinances required to maintain the proper sanitary condition of the city, for the obvious reason that it would discover what might be requisite for that purpose in the discharge of its other duties, more readily than either of the other departments. The power was necessary to provide for apprehended emergencies, and it was placed where it could be most efficiently exercised. That the legislature could confer it upon the corporation is very clearly settled by an unbroken weight of authority; *Jones v. Firemen's Fund Ins. Co.* (2 Daly, 307); *Hopkins v. Mayor of Swansea* (4 Meeson & W. 621), where it was held that corporate by-laws, enacted by authority, have the same effect within the appropriate limits as an act of Parliament (*id.* 640); *Heland v. City of Lowell* (3 Allen, 407), in which an ordinance was held to be as binding on the members of the corporation and all other persons, as any statute or other law of the Commonwealth (*id.* 408); *City of Brooklyn v. Breslin* (57 N. Y. 591); *Heister v. Metropolitan Board of Health* (37 *id.* 661); *Tanner v. Trustees of Albion* (5 Hill, 121), where such power was given to, and exercised by, the trustees of a village; and there is nothing in either of these decisions by which it has been required to be lodged in any particular functionaries of the municipality.

The practice, on the other hand, has long existed, by which this power has been conferred upon boards of health, and it has not been limited to the cases of large cities, but the trustees of villages and the local officers of towns, even, have been made its recipients, and they, with the more complete boards of cities, have been delegated similar authority to enact and enforce such ordinances and regulations as the exigencies of the public health should appear to require. (Laws of 1850, ch. 324, §§ 1-3; sub. 3, § 3; Laws of 1854, ch. 169; Laws of 1870, ch. 559.) The ordinance in this case could not be held invalid without practically undermining this entire system, which has existed for years entirely unchallenged. The power of the legislature over this subject has not been denied by the constitution, and the conclusion necessarily follows that it could, as it has, delegate to the board of health of the city of New York the power to make the ordinance in question. It was merely the exercise of municipal authority through the intervention of this board instead of the common council, and no well founded objection could be taken to that, as long as the ordinances to be enacted were to be confined to the subject committed to its jurisdiction and control. . . .

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

STATE, *ex rel.* HOWE, COUNTY ATTORNEY, v. MAYOR,
ETC., OF DES MOINES **Levy on tax.*

103 Iowa, 76. 1897

ACTION for *mandamus* to compel the city council of the city of Des Moines to levy a tax for library purposes, at a rate fixed and certified by the board of library trustees of the city. That board was established by ch. 41, Acts Twenty-fifth General Assembly, as amended; which provides that the members shall be appointed by the mayor, with the approval of the council; that the board shall have full control over the library of the city and over the funds raised for library purposes by taxation; that the board shall annually fix the amount to be raised for library purposes for the ensuing year (for maintenance not exceeding one mill on the dollar and for a building and a sinking fund not exceeding three mills on the dollar), and cause the same to be certified to the city council; and that the city council shall levy taxes necessary to raise the sums so certified and shall certify the rate of such taxes to the county auditor.

This act, by its terms, applied to all cities which had previously accepted the provisions of § 461, of the Code of 1873, and Des Moines is one of those cities. By that section of the Code cities of the first and second classes were empowered to levy an annual tax, not exceeding one-half mill on the dollar of taxable property, for a public library.

A jury was waived. After trial, the court gave judgment for the defendants. Plaintiff appeals.

Read & Read and Hubbard & Dawley, for appellant.

J. K. Macomber and Bishop, Bowen & Fleming for appellee.

KINNE, C. J. . . . If it be conceded that a tax for the maintenance of a public library and for the erection of a library building is a tax for a public purpose, and hence one which, in furtherance of the general public policy of the State, may be compelled to be levied, may the legislature authorize its levy by the board of library trustees? Touching the power of the legislature to delegate the taxing power, Judge Cooley says: "It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system, and, when properly understood, permits of no exception, and it is applicable with peculiar force to the case of taxation. *The power to tax is a legislative power.* The people have created a legislative department for the exercise of the legislative power, and within that power lies the authority to prescribe the rules of taxation, and to regulate the manner in which those rules shall be given effect. . . . There is, nevertheless, one clearly defined exception to the rule,

that the legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent, which is conclusive. These exceptions relate to the case of municipal corporations. Immemorial custom, which tacitly or expressly has been incorporated in the several State constitutions, has made these organizations a necessary part of the general machinery of State government, and they are allowed large authority in matters of local government, and to a considerable extent are permitted to make the local laws. This indulgence has been carried into matters of taxation; the State in very many cases doing little beyond prescribing rules of limitation within which, for local purposes, the local authorities may levy taxes. . . . The legislature, however, in thus making delegation of the power to tax, must make it to the corporation itself, and provide for its exercise by the proper legislative authority of the corporation. . . . What is true of the State is equally true of the municipality, — that the power they possess to tax must be exercised by the corporation itself, and cannot be delegated to its officers or other agencies." *Cooley, Taxation* (2d ed.), pp. 61, 63, 65. The doctrine laid down by the learned author is that the delegation of the power to tax by the legislature must be made to the municipality itself, and that it cannot be delegated to other agencies.

The constitution of the State of Illinois contains the following provision: "The corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes." Constitution Illinois, 1848, Art. 9, § 5. In construing this provision, the supreme court of that State said that the phrase "corporate authorities," as used in the constitution, must be understood as "those municipal officers who are either directly elected by the people to be taxed, or appointed in some mode to which they have given their assent. *People v. Mayor, etc. of City of Chicago*, 51 Ill. 17. The same court, in construing the same constitutional provision, said: "The power of taxation is, of all powers of government, the one most liable to abuse, even when exercised by the direct representatives of the people; and, if committed to people who may exercise it over others without reference to their consent, the certainty of its abuse would simply be a question of time. No person or class of persons can be safely intrusted with irresponsible power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government. It matters not that, as in the present instance, it is to be professedly exercised for public uses by expending for the public benefit the tax collected. If it be a tax, as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority of any kind, by those whom they propose

to tax, it is, to the extent of such tax, misgovernment of the same character which our forefathers thought just cause of revolution. We are of opinion that we do no violence to the language of the clause in the constitution we have been considering by holding that it was designed to prevent such ill-advised legislation as the delegation of the taxing power to any person or persons other than the corporate authorities of the municipality or district to be taxed. These authorities are elected by the people to be taxed, or appointed in some mode to which the people have given their assent, and to them alone can this power be safely delegated." *Harward v. Drainage Co.*, 51 Ill. 130. In still another case, in which the constitutionality of the metropolitan police act of the city of East St. Louis was under consideration, and in which the police commissioners were appointed by the act, and given power, not to levy a tax, but to estimate what sum of money would be necessary for each fiscal year to enable them to discharge the duties imposed upon them, and the act required the city council to appropriate and set apart the amount so certified out of the general fund of the city, and, in case the council failed so to do, then it was made the duty of the board of commissioners to issue certificates of indebtedness in the name of the city for the amounts so certified, the court said: "These police commissioners are not the corporate authorities of East St. Louis, and therefore can have no power of taxation." They are not elected by the people of that city nor appointed in any mode to which the people have given their assent. The act creating them has never been accepted by the people or by the city council, but, on the other hand, as alleged in the bill, the council has constantly denied the authority of the commissioners." *Hinze v. People*, 92 Ill. 406. See, also, *Updike v. Wright*, 81 Ill. 49; *People v. Morgan*, 90 Ill. 558. . . . [The court then stated, and quoted from, *Board of Commissioners v. Abbott*, 52 Kan. Sup. 148 (34 Pac. Rep. 416); *Parks v. Board of Commissioners*, 61 Fed. Rep. 436, and *People v. Common Council of Detroit*, 28 Mich. 228.]

We say, then, that there is an implied limitation upon the power of the legislature to delegate the power of taxation. This, of necessity, must be so, otherwise the legislature might clothe any person with the power to levy taxes, regardless of the will of those upon whom such burdens would be cast, and such person might be directly responsible to no one. Whatever the effect of the constitutional provisions in Illinois and Kansas may be, the reasoning of the cases is in line with the views expressed by Judge Cooley, and it is equally applicable to cases where there are no express constitutional limitations. It is said that it is not true that power to determine the rate of taxes must be committed to the proper legislative authority of the corporation, and certain instances in this State are cited, as the power given the executive council to determine the rate of tax for State purposes. . . . Code 1873, section 835. But counsel have cited no instance in the legislation of this State, and we have found none, where the power to

tax was conferred upon a board or officer not elected by and immediately responsible to the people, and we are unwilling to extend the right to delegate such power to any body or person not directly representing the people. The danger which lies in delegating such power to any person or board not directly responsible to the taxpayers is so forcibly set forth in the citations we have made that we need not enlarge upon it. If the power to tax may be by them vested in a board of library trustees, against the will of the people, it may be reposed in any other body which is not directly accountable to the people. . . .

We have treated this statute as, in effect, authorizing the library board to levy the tax. In fact, it in terms directs them to fix and determine the amount of the tax, which, upon being certified to the council, it must levy. The right to thus fix and determine is equivalent to the right to levy. . . .

The remaining question is, Have the people of the city of Des Moines in any manner assented to the exercise of the power of taxation attempted to be conferred upon and exercised by the board of library trustees? The people of the city did by vote accept the provisions of the law as it then existed. The law then did not authorize any increase of taxation, and the library was under the direct control and management of the city council, who were elected by the people. By subsequent acts of the legislature a board of trustees was established and their duties and powers fixed; the control and management of the library was by statute vested in said board, and the board was vested with the power of absolutely determining the amount of tax that should be levied. It will be seen that the people assented by their vote to maintaining a public library, which should be under the control of the council which they elected. They never consented to the creation of a board of library trustees which should be in control of the library, and be substantially vested with the power to levy taxes without the consent and against the will of the people. The placing of the extraordinary power of taxation in a body not the direct creation of, or directly responsible to, the people, was in no way involved in the vote of the people had before such powers were conferred or thought of. Here, by an act passed subsequent to the vote of the people, the legislature empowers an irresponsible board (irresponsible in the sense that they are not directly accountable to the people) to fix a tax levy limited in the amount which may be raised each year, but unlimited in duration, so that millions of dollars may be accumulated without consulting the people, or their immediate representatives, the city council. . . .

Nor can we agree to the contention that, inasmuch as the people elect the city council and the mayor, and the mayor appoints the library board with the consent of the council, therefore such board is, in fact, selected by the people, or that thereby the people assented to the legislation creating the board and endowing it with the power

to fix and determine the taxes to be levied. If such contention was correct, it would be difficult to find a case of an officer or board vested with taxing powers, no matter by whom appointed, when by the same process of reasoning the original power could not be traced through the various offices or agencies to the people themselves. Suppose the act at bar had provided that the board of library trustees for the public library of the city could be appointed by the governor of the State, it would not be contended for a moment that the people, by voting for and electing the governor who appoints such a board, thereby gave their assent to such a mode of appointment. . . .

The action of the district court in refusing a writ of *mandamus* and in rendering a judgment against the plaintiff for costs was correct, and the

Judgment is affirmed.

3. *Form of Municipal Government: Creation by General Laws*

ECKERSON *et als.* v. CITY OF DES MOINES *et als.**

137 Iowa, 452. 1908

ACTION in equity by taxpayers for an injunction to prevent the city and its officers from going forward with the organization of a new city government under chapter 48 of the Acts of the Thirty-second General Assembly. The petition alleges that at an election duly held in the city under that act a majority of the votes cast were in favor of adopting its provisions, and that the defendants are preparing to hold a primary and a general election for the choice of officers thereunder. The ground of the petition is, as averred, that the act is unconstitutional.

The city of Des Moines is a city of the first class, organized under previous general statutes, and its population is over forty thousand. The act here involved provides that "any city of the first class, or with special charter, now or hereafter having a population of twenty-five thousand or over, . . . may become organized as a city under the provisions of this act by proceeding as hereinafter provided;" that is, on petition of electors an election shall be held on the question whether the city shall organize under the act; and if the majority of votes cast shall be in favor of so organizing, an election shall be held for choosing the officers for which the act provides.

The act vests the powers of the city in a council, composed of five members — a mayor and four councilmen to be nominated and elected at large. The mayor is to preside, and to have the right to vote, but not to veto. Section 7 is as follows:

"The council shall have and possess and the council and its members shall exercise all executive, legislative, and judicial powers and duties now had, possessed and exercised by the mayor, city council, board of public works, park commissioners, board of police and fire commissioners, board of waterworks trustees, board of library trustees, solicitor, assessor, treasurer, auditor, city engineer, and other executive and administrative officers in cities of the first class and cities acting under special charter. The executive and administrative powers, authority, and duties in such cities shall be distributed into and among five departments, as follows: 1. Department of public affairs. 2. Department of accounts and finances. 3. Department of public safety. 4. Department of streets and public improvements. 5. Department of parks and public property. The council shall determine the powers and duties to be performed by, and assign them to, the appropriate department; shall prescribe the powers and duties of officers and employees; . . . and may make such other rules and regulations as may be necessary or proper for the efficient and economical conduct of the business of the city." By section 8 it is provided that the mayor shall be superintendent of the department of public works, and to each of the other departments a councilman shall be elected by the council as superintendent.

The council is to elect the city clerk, treasurer, and various other executive officers.

It is provided also that the ordinances, and the rights, property, and liabilities of the city as previously organized shall continue.

From a ruling which sustained demurrers to the petition and to the petitions of certain interveners, the plaintiffs and the interveners appeal.

Samson & Dillon, for appellant Eckerson.

Carr, Hewitt, Parker, and Wright, for appellant A. M. Huston.

W. L. Read, for appellants board of park commissioners.

Bremmer, Earle, Cohen, McLaughlin, for appellees.

BISHOP, J. . . . I. Taking up the matters of contention in the order which seems to us best adapted to a disposition of the case, we have as the first question, Is chapter 48 violative of section 4, article 4, of the Federal Constitution? The portion of the section invoked reads thus: "The United States shall guarantee to every State in this Union a republican form of government." This guaranty — so runs the contention — is not alone to the State, as such, but extends to the various subdivisions thereof intended to have part in the affairs of government. And the argument follows that a form of municipal government which ignores the essential features of executive, legislative, and judicial departments, each of which shall be separate and distinct from the others, and commits the functions of government to a single board or body, is non-republican, and hence repugnant to the guaranty. In our view the hypothesis is wholly wrong, and hence the argument is without force. The purpose of the Federal Constitution was to provide a form of government, republican in character, for the States as a united whole. This

is manifest from the history of the times, the contemporaneous writings and public addresses, the constitutional debates, and the provisions of the instrument itself as adopted. And whatever may be the form of words employed by the lexicographers — and they are more or less varied — to define what is meant by the expression “a republican form of government,” it is clear that it was understood by the fathers to mean a government by the people, through representatives appointed by them to the various departments — executive, legislative, and judicial, as provided — either by direct vote or through some intervening officer or body by them selected and appointed by direct vote for the purpose. Now, at the time the Constitution was adopted, as it is well known, there were in existence thirteen States, each thereof supreme as related to its own domestic affairs, and in each of which the government was divided into three departments — executive, legislative, and judicial — and carried on through representatives selected from time to time by vote of the people. It is to be noted, however, that the form of local government provided for municipalities and other State subdivisions varied in the different States. In some pure democracy obtained through the medium of the “town meeting;” in others, boards of selectmen were chosen, etc. That the form of government in vogue in these States was republican was not made the subject of question when the Federal Constitution came to be considered. No one of such States was called upon to amend its plan of government — State or municipal — to bring it into harmony with the plan proposed for the Federal government.

Now, having agreed upon a form or plan of general government it became of interest, as we conceive, that there should be maintained in the several States, then and thereafter composing the Union, a form of government constructed along the lines then presently existing, and generally to be in harmony with the Federal plan agreed upon. And, to secure this there was included in the constitutional writing the guaranty provision now under consideration. In this view it becomes apparent that the guaranty was intended to be to the States as such; that it was not intended to have any relation to the systems of local government provided by the several States for the regulation of their municipalities or other subdivisions. Says Judge Cooley in his work on Constitutional Limitations, 28: “The purpose of this guaranty was to protect a Union founded upon republican principles against aristocratic and monarchical invasion,” that is, to prevent the people of a State from abolishing a republican form of government. And this is the thought of text and essay writers generally. Clearly enough, there is nothing in the language of the guaranty to indicate a purpose on the part of the general government to interfere with those matters of internal or domestic concern within a State which are of interest only to the people thereof — at large, or as divided into communities. And as the language does not give warrant, the power does not exist. . . .

II. More or less in line with the contention disposed of in the preceding division of this opinion is the further contention of plaintiffs that chapter 48 is void because repugnant to section 1, article 3, of the constitution of this State. That section reads as follows: "The powers of the government of Iowa shall be divided into three separate departments: the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others." It will be observed that by section 7 of chapter 48, the municipal powers — executive, legislative, and judicial — possessed by the cities becoming organized under the act, shall be exercised by the council consisting of the mayor and four councilmen elected as herein provided for. But little is necessary to be said in making disposition of this contention. To our minds it seems plain that the Constitution has reference solely to the instrumentalities through which the powers of the State — acting directly in its sovereign capacity — shall be exercised. . . . As it is well known, the county courts of this State, when they existed, were not only authorized to perform judicial duties, but executive and legislative as well. Under the general statutes now existing, mayors of cities and towns have conferred upon them powers and duties both executive and judicial, and, particularly in towns, the mayor, in virtue of his right to vote on all questions coming before the council, constitutes in all strictness a part of the town corporate legislative body. Boards of supervisors, city and town councils, boards of school directors, township trustees, and various individual officers are directly charged with and are in the performance of powers and duties, now administrative in character, and again judicial, etc. We shall not stop to further particularize. The statute book of this State, as of every State in the Union, is replete with illustrative examples. In support of their position, counsel for plaintiffs rely upon *Attorney General v. Detroit*, 112 Mich. 145 (70 N. W. 450, 37 L. R. A. 211) and *Whitcomb's Case*, 120 Mass. 118 (21 Am. Rep. 502). In our opinion the cases thus cited do not reach the question as made on the record before us. As the books in which they are to be found are generally accessible, we shall not stop to discuss them.

III. Section 30, article 3, of the constitution of this State, provides that the General Assembly shall not pass local or special laws for the incorporation of cities and towns. In such cases, the laws shall be general, and of uniform operation throughout the State, and by section 6, article 1, it is provided that all laws of a general nature shall have a uniform operation. Plaintiffs and interveners challenge chapter 48 as violative of the provisions thus cited. And this is the matter upon which principal stress is laid in argument. As we understand, the grounds of contention are these: (1) The act is local or special legislation, because the proposed operation thereof is restricted to a limited number of cities — *i. e.*, those of the first class and under special charter

having a certain population and which elect to adopt the same; (2) the act is not intended to have, nor is it possible that it should have, uniform operation, because (a) the classification adopted is arbitrary and without substantial grounds of distinction in its designation of the cities to be affected; and (b) it is intended to have application only to those cities which accept it on popular vote of the electorate. The questions arising out of these matters of contention are somewhat interwoven, and may properly be discussed in the same connection.

In a sense, it is true that according to its terms the act is to have a limited operation. But it is a limitation founded upon inherent conditions, and not upon number. It will be observed that the reading of the act is "any city"; there is no attempt to make individual selection. This being true, there is no force in the contention that the act must be condemned because local or special. Those words as employed in the Constitution are essentially descriptive. While, theoretically, they are not strictly similar in meaning, still when we consider the circumstances of their use, as we are authorized to do, it becomes clear that the framers of the Constitution employed them as equivalents — as descriptive of one and the same thing. . . .

Failing to specialize the place, an act could not in the very nature of things be local. On the other hand, it does not seem that there could be a special act for incorporation without reference made therein in some way, direct or indirect, to the place within the limits of which the act should have force of operation. From all this, we have the ultimate conclusion that the prohibitive ban of the present Constitution is against an incorporation act, the distinctive features of which shall be the selection of a fixed and definite territorial location, and a grant of individualized powers; powers not necessarily different in character from those to be found in other grants, but made up without reference to any other grant. It follows from this that the words "local" and "special" must be accepted as synonymous, in the sense that they are descriptive of one and the same thing. When analyzed, our own cases will be found to rest upon this view. The practice of municipal classification — each class having granted powers differing in many respects from those enjoyed by the others — dates back to the organization of the State. And this court has uniformly recognized the practice as within the legislative authority. The doctrine of all the cases is that an act is not local or special if it brings all municipalities similarly conditioned — then existing and thereafter to come into existence — into a class, and in respect of each of which the act is to have uniform operation. . . .

The act under consideration in *Tuttle v. Polk* [92 Ia. 433] was one granting certain powers and privileges to all cities of the first class having a population of thirty thousand or over; thus excluding, it is to be observed, other cities of the first class then existing within the State. The act was assailed as local or special, and in disposing of the contention the court said: "At the time it (the act in question) was

enacted the city of Des Moines was the only one in the State having a population as great as the number stated, but that fact did not make the act special, for the reason that it was not restricted to cities having the required population at the date it became a law, but was general, applying to all cities which should thereafter have more than thirty thousand." If, in respect of its intended application, the act particularizes the place — or, for that matter, places — which is made the recipient of corporate authority, it is offensively special. On the other hand, an act is general if the effect thereof on being put into operation is to bring into a class all places similarly conditioned — then existing, or thereafter to come into existence — and in respect of each of which places the provisions of the act are to be equally applicable. . . .

Coming to the second question, in the situation of this case, it would seem that but little need be said. Conceding the rule that classification of municipalities by legislative act — the object being to confer upon a class selected some exclusive power or powers — must be founded upon some appreciable difference in condition, existing or to be apprehended, still it remains to be said that the question whether conditions do exist which reasonably call for the classification and exclusive grant of powers must be answered, primarily at least, by the lawmaking body. And it is fundamental doctrine that the courts will not interfere on constitutional grounds unless the act is clearly and palpably within the inhibition of the fundamental law. . . .

If all cities availing themselves of the act are to be governed alike, the law is uniform. And this conclusion is not disturbed because, forsooth, it is possible, or even probable, that some one or more of the eligible cities may not avail themselves of the act. Further discussion of the point does not seem to us necessary. Our conclusion finds support in the following cases: *Dalby v. Wolf*, 14 Ia. 228; *State v. King*, 37 Ia. 462; *Lytle v. May*, 49 Ia. 224; *State v. Forkner*, 94 Ia. 733; *Adams v. Beloit*, 105 Wis. 963 (81 N. W. 869, 47 L. R. A. 441); *People v. Kipley*, 171 Ill. 44 (49 N. E. 229, 41 L. R. A. 775). . . .

IV. As further violative of section 1, article 3, of the State Constitution, counsel for plaintiffs assail the act because of the provision therein that it shall not become effective as related to any particular city except on affirmative vote of the electors thereof. And here it is said to be an attempt to delegate legislative power. We may concede that the lawmaking body of the State is not authorized to submit to a popular vote of the State the question whether or not an act proposed by it shall become a law. This court has so held in a number of cases. *Santo v. State*, 2 Ia. 165; *Geebrick v. State*, 5 Ia. 491; *State v. Weir*, 33 Ia. 134; *State v. Forkner*, 94 Ia. 733. But while this is so, it does not follow by any means that the lawmaking body may not reserve to the electors of a subdivision of the State — included within the intended scope of operation of an act designed to have effect upon local government conditions — the right to determine on popular vote whether or not they will

advantage themselves of the act. If an act in question is complete in itself, and requires nothing further to give it validity as a legislative act, it is not vulnerable to attack on constitutional grounds simply because the limits of its operation are made to depend upon a vote of the people. And such is not only the doctrine of our own cases, but it accords with the great weight of authority.¹ . . .

It follows that the ruling on the demurrer was correct, and it is
*Affirmed.*²

¹ "Nevertheless, as the incorporators have a special and peculiar interest in the terms and conditions of the charter, in the powers conferred and liabilities imposed, as well as in the general question whether they shall originally be or afterwards remain incorporated at all or not, and as the burdens of municipal government must rest upon their shoulders, and especially as by becoming incorporated they are held, in law, to undertake to discharge the duties the charter imposes, it seems eminently proper that their voice should be heard on the question of their incorporation, and that their decisions should be conclusive, unless, for strong reasons of State policy or local necessity, it should seem important for the State to overrule the opinion of the local majority. The right to refer any legislation of this character to the people peculiarly interested does not seem to be questioned, and the reference is by no means unusual.

"For the like reasons the question whether a county or township shall be divided and a new one formed, or two townships or school districts formerly one be reunited, or a city charter be revised, or a county seat located at a particular place, or after its location removed elsewhere, or the municipality contract particular debts, or engage in a particular improvement, is always a question which may with propriety be referred to the voters of the municipality for decision." *Cooley's Constitutional Limitations* (7th ed.), p. 168-8.

² Other points decided by the court are as follows:

Removal from Office. "Recall." A person in possession of a public office has no constitutional right thereto even for the full period of his term; and the legislature may provide for his removal from an office of its own creation during his term, by a vote of the people of the municipality from which he was elected.

"Initiative" and "Referendum." The legislature may provide that a popular vote may be resorted to in the enactment of municipal law; the provisions of the constitution vesting all legislative authority in the General Assembly having no application to the legislative power of city councils.

Rights of Suffrage: Nomination: Ballots. Chapter 48, Acts Thirty-Second General Assembly, which prescribes a form of government for certain cities, and provides that in preparing the primary ballot for the nomination of officers no names shall be placed thereon except those of persons who have filed a statement of candidacy, etc., does not intend thereby to abridge the right of voting for persons other than those named on the ballot, by inserting their names in writing, and hence is not repugnant to the constitutional provision guaranteeing the unrestricted right to vote for any person or to be a candidate for any office.

CHAPTER III

POWERS

1. *In General*

SPAULDING v. THE CITY OF LOWELL*

build a market-house without special authority from state - Lowell
23 Pick. (Mass.) 71. 1839

ASSUMPSIT for money had and received, to recover back the amount of a tax for the year 1836, assessed by the defendants upon the plaintiff, and paid by him. The parties stated a case.

The town of Lowell was incorporated as a city on the first of April, 1836. In 1835, the town had voted to erect a market-house; and had appointed a committee to purchase certain land, and build a market-house of certain dimensions thereon. Part of the tax assessed by the city for the year 1836 was for building the market-house. The plaintiff refused to pay the amount of this tax assessed upon him, and payment was enforced by distress.

The town was previously provided with a commodious townhouse. The market-house has been built at an expense of \$46,000. About two-thirds of the upper part of the building are used by the county as court-rooms, etc. The separate expense of the court-rooms and appurtenances, has been \$8,998. On the completion of the building the stalls in the market-house were let.

If the court should be of opinion that the tax was valid, the plaintiff was to be nonsuit; otherwise the defendants were to be defaulted.

Robinson and Mellen, for the plaintiff.

Lawrence and Ames, for the defendants.

SHAW, C. J. The question, and the only one of considerable importance, in the present case, is, whether the plaintiff was liable for the tax, which he was compelled to pay, and the amount of which, he seeks to recover back in the present action. The objection is, that it embraced an assessment, to raise money for a market-house, which the town of Lowell, before its incorporation as a city, had voted to build. No question in this case arises upon the relative rights and powers of towns and cities, or upon the change from one form of municipal government to another, during the pendency of these proceedings. Lowell was established as a city on April 1, 1836. By the terms of the charter, they were made or rather continued a corporation for all purposes, for which towns are incorporated, and they were thereby

declared to be entitled to all the rights, immunities, powers, and privileges, and subject to all the duties and obligations before incumbent upon and appertaining to said town. The question, therefore, resolves itself into the general one, whether cities and towns, in this Commonwealth, by virtue of their general powers, and without any special authority conferred on them respectively for that purpose, have authority in their corporate capacity to build a market-house, to appropriate money therefor, and assess the same, in common with other town charges, upon the inhabitants.

The principle is now well settled, that corporations, being creatures by which several persons are associated together to act in concert, for special purposes, can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. . . .

But although the rule as thus stated, and thus important and salutary, is clear and unquestionable, yet much difficulty arises in the application of it, to such a class of corporations as cities and towns, on account of the indefinite and miscellaneous purposes, for which they are constituted. This difficulty is stated and illustrated in the case last above cited. *Willard v. Newburyport*, 12 Pick. 227.

The general authority of towns to raise money by assessment of taxes on the inhabitants, was given by St. 1785, ch. 75, § 7, "for the settlement, maintenance and support of the ministry, schools, the poor, and other necessary charges arising within the same town."

The authority is not much more definitely expressed in the Revised Statutes. Revised St. ch. 15, § 12.

"Towns shall have power to grant and vote such sums of money as they shall judge necessary, for the following purposes: for the support of town schools; for the support and maintenance of the poor; for burial grounds; and for all other necessary charges arising within the same town."

By a comparison of the two provisions it will appear that one object of town charges is introduced into the Revised Statutes that was not expressed in the old one, that of burial grounds. This subject was one of those miscellaneous cases, mentioned in the case last cited, over which towns exercised an authority in fact though none was given by statute. It is since conferred by this provision of the Revised Statutes.

But the same remark may be applied to this, as to the old statute, that it is manifestly not intended as an enumeration of all the particular objects, because some of the most obvious subjects of town charge are omitted, such as highways and bridges, pounds, magazines, and many others. This is also manifest from the sweeping clause "other necessary charges," which clearly implies, that many things not enumerated are intended to be included. But the court are not at all prepared to

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say, that under this term, "other necessary charges," coupled with the previous clause, "such sums as they shall judge necessary," it was intended to authorize towns to raise and appropriate money for general objects, or that it was intended to constitute a new, substantive power of taxation. It would be letting in all the mischiefs, arising from an indefinite and arbitrary power of a majority to bind a minority, to an unlimited extent. *Beaty v. Lessee of Knowles*, 4 Peters, 152. On the contrary, we think it referred to other provisions of law, and well established usage, to ascertain what the objects of town charge are, and to provide that towns might raise money for any purposes thus determined. But to bring any particular subject within this description of necessary town charges, it must appear to be money necessary to the execution of some corporate power, the enjoyment of some corporate right, or the performance of some corporate duty, as established by law or by long usage. For instance, towns are authorized and required to hold meetings; as incidental thereunto they may hire, purchase, or build a town-house. They may prosecute and defend suits; as incident to which, they may appropriate money to retain counsel, to pay costs, and to meet and satisfy judgments, which may be recovered against them. In this very case, should the plaintiff recover, the defendants must have authority in their corporate capacity, to raise money to satisfy the judgment, of which the plaintiff, if he continues an inhabitant, will be liable by way of assessment to pay his part.

The earlier statutes of the province and colony, concur with those under the present constitution, in vesting towns with the power to agree upon and make rules, orders, and by-laws for managing and ordering the prudential affairs of the town, St. 1785, ch. 75, § 7; Revised St. ch. 15, § 13. The ambiguity lies in the indefinite term *prudential affairs*, and the difficulty arises in each case, in settling what concerns fall within it. . . .

In the case of *Willard v. Newburyport*, above cited, some attempt was made to describe what is understood to be "prudential concerns," by stating that it embraces those subjects affecting the accommodation and convenience of the inhabitants, not otherwise specifically provided for, which have been placed under the jurisdiction of towns by statute or by usage. It may be suggested that referring to usage as a source of this power, is still leaving subjects open to doubt. It does so; but as there are some subjects which have long been regarded as within the authority of towns, not made so by statute, and as such powers have never been questioned, there is no authority whence they can be derived but usage. Indeed a recurrence to the history of the formation of towns, will show that most of the powers originated in usage, founded on the convenience and necessities of the inhabitants, and were afterwards recognized and confirmed by statute. Townships were originally local divisions of the territory, made with a view

to a settlement and disposition of the property in the soil. But the inhabitants of each acted together on many subjects of common interest to themselves, and those especially, in the first instance, which affected the partition and appropriation of the land, amongst the proprietors, who were strictly tenants in common. But from convenience and necessity, they adopted many other regulations, affecting their mutual interests as settlers and inhabitants. After these regulations had continued for some years, they were recognized and confirmed by statute. The first act which seems to have been passed was in 1670, forty years after the first settlement. And the provincial act of 1692 contains a preamble reciting, that whereas it has been a *continued practice and custom* in the several towns within this province, annually to choose selectmen or townsmen, for the ordering and managing of the prudential affairs, etc., and then goes on to provide for the choice of selectmen, overseers, constables, surveyors of highways, tithingmen, fence-viewers, clerks of the market, sealers of leather, and *other ordinary town officers*. The same statute gives to towns the authority to make orders and by-laws, "for managing and ordering their prudential affairs of such town, as they shall judge most conducing to the peace, welfare, and good order thereof." From this and various other legal provisions, we think it will be found that towns were not originally incorporated with specific and enumerated powers; but that the inhabitants and settlers of each township, as organized bodies, adopted regulations for their common convenience, and when they were incorporated, or rather recognized by general laws, as established corporations, the powers which they had thus been used and accustomed to exercise, were referred to, and confirmed, under the very broad and comprehensive term, "prudential concerns." So in the officers to be elected, after enumerating many specifically, the statute of 1692 adds, "other ordinary town officers." Care seems to have been taken lest in a specific enumeration some might be omitted, who, according to custom, ought to be chosen. And the same solicitude is manifest through all the succeeding enactments, down to the Revised Statutes, which, after enumerating many officers to be elected, closes with the addition of "all other usual town officers."

In looking to usage and custom as the means of ascertaining what subject of common interest is embraced under the term "prudentials," the court are of opinion, that the erecting of a market-place, in the large towns and populous villages, is embraced. The circumstance, that special acts of legislation have been occasionally passed respecting the building of market-houses, can have no considerable influence. Even if they embraced a power, in terms, to erect a market-house, it might be accounted for, by considering it as done *ex majori cautela*; but in general it will be found, that these acts embraced other and additional powers, which could not be used under the general authority to erect a market-house, such as the taking of land for the

public use, as in the case of the extension of Fanueil Hall Market or the like. St. 1823, ch. 147. In the case of *Stetson v. Kempton* [13 Mass. 272], which seems to have been well considered, and has ever since been regarded as a leading case, in considering what limitation is to be put on the power to raise money, for "other necessary charges," it is said, "the erection of public buildings for the accommodation of the inhabitants, such as town-houses to assemble in, and market-houses for the sale of provisions, may also be a proper town charge, and may come within the fair meaning of the term 'necessary.' " And though it was not the question directly before the court, yet being put by way of instance as itself unquestionable, to illustrate the general proposition, and to distinguish what were and what were not objects of town charge, it is very strong evidence of the usage.

On the whole, the court are of opinion, that the town and city of Lowell had authority to raise and appropriate money for building a market-house, and to assess the same upon the inhabitants.

It was further contended, in the present case, that even if the town had authority to assess money for building a market-house, yet that it would not justify the present tax, because a part of the building was appropriated to other objects. If this had been a colorable act, under the pretense of exercising a legal power, looking to other and distinct objects beyond the scope of the principal one, it might be treated as the abuse of power, and a nullity. But we perceive no evidence to justify such a conclusion, in the present case. The building of a market-house was the principal and leading object, and everything else seems to have been incidental and subordinate. We cannot therefore say that it was such an excess of authority as to invalidate the acts which they might rightfully do. As to the size and other circumstances of the building, if the accomplishment of the object was within the scope of the corporate powers of the town, the corporation itself was the proper judge of the fitness of the building for its objects, and it is not competent in this suit to inquire whether it was a larger and more expensive building, than the exigencies of the city required.¹

Plaintiff nonsuit.

Inherent to promotion of 39th Mass.

TOWN OF JACKSONPORT v. WATSON *et al.*

33 Ark. 704. 1878

ENGLISH, C. J. . . . The bill alleges, in substance, that complainants are citizens of the State and residents and taxpayers within the limits of the corporation.

¹ See *Torrent v. Muskegon*, 47 Mich. 115.

That, in November, 1876, the town council appropriated from its treasury \$200, in State scrip, for the purpose of establishing a free ferry at Scott's Point, on White River, about a half or three-quarters of a mile from the town, and without the limits of the corporation. That, under the directions of the council, the scrip was sold, and proceeds expended in purchasing a ferry-boat and skiff. That the council had employed Jack Moore to run the ferry at \$23 per month, and was about to appropriate money out of the treasury of the corporation to pay his wages, and would do so unless restrained. That defendant was not authorized to run a public ferry at Scott's Point, or to appropriate money for that purpose out of its treasury; nor had it a license from the county court or elsewhere to keep the ferry. Prayer for injunction against appropriating the money of the corporation to maintain the ferry, etc.

The defendant answered that the object of the town council in establishing a free ferry at Scott's Point, was to induce citizens residing west of White River to make Jacksonport their place of trading, and thereby to increase the trade and commerce of the town, and promote its growth, prosperity, etc. That on the 1st of January, 1876, the county court granted a license to John Cost, to keep said ferry for that year, which license defendant acquired by purchase. That on the 1st of January, 1877, Thad D. Kemnan obtained license to run said ferry, and transferred the license to defendant, under which it was operating the ferry free of charge to promote the business of the town, etc.

On the filing of the bill, an interlocutory injunction was granted, and on the final hearing the court rendered a decree making the injunction perpetual, and defendant appealed to this court.

1. A court of equity may, at the suit of property holders or taxable inhabitants of a municipal corporation, restrain the corporation and its officers from making an unauthorized appropriation of the corporate funds. This is so because the corporation holds its money for the corporators, the inhabitants of the town or city, to be expended for legitimate corporate purposes, and a misappropriation of these funds is an injury to the taxpayer, for which no other remedy is so effectual or appropriate as an injunction. *Dill. Mun. Corp.*, §§ 731, 732, etc.

2. In the Act of 9th March, 1875, for the incorporation, organization, and government of municipal corporations (*Acts of 1874-5*, p. 1), we find no express grant of authority to councils of cities or towns to expend the corporate funds in establishing and operating free ferries without the limits of the corporation, to promote trade, commerce, etc.

Counsel for appellant submits that the power to maintain the free ferry in this case may be implied from general grants contained in section 22 of the act. The section provides, among other things, that "municipal corporations, etc., etc., shall have power to make and publish by-laws and ordinances, not inconsistent with the laws of this State, as to them shall seem necessary to provide for the safety, preserve

the health, promote the prosperity, and improve morals, order, comfort, and convenience of such corporations and the inhabitants thereof." If, under these general expressions, a corporation may appropriate corporate funds to establish and maintain a free ferry without its limits, it may as well aid in the construction of railroads, bridges, etc., and subject the corporations to burdens for such purposes, under the plea of promoting the prosperity of the corporation and the inhabitants thereof.

To engage in such enterprises, express grants are required. *Dill. Mun. Corp.*, §§ 104, 1064; *Chisholm v. City of Montgomery*, 2 Wood. 594.

Affirmed.

Not sufficient
to show it
was for the
prosperity

Expenditure to promote the health, order, comfort, and convenience of the inhabitants of the city of Henderson is not a public use.
HENDERSON et al. v. CITY OF COVINGTON et al.

14 Bush (Ky.), 312. 1878

JUDGE COFER. The city council of Covington, desiring to procure legislative authority, to the city, to build a bridge over the Ohio River, and also desiring some additional legislation by Congress in aid of the project, procured Worthington and others to visit the city of Frankfort, and advocate before committees of the General Assembly the passing of the desired State legislation, and W. E. Arthur to visit the Federal capital and procure the necessary congressional action. Afterwards the city council passed a resolution appropriating, out of the revenues of the city, the sum of \$186, to pay the expenses incurred by those gentlemen in going to Frankfort and Washington City. The appellants, who are residents and taxpayers of the city of Covington, brought this suit to enjoin the city officials from paying the money in accordance with the resolution of the council. The court below sustained a demurrer to the petition, and the only question in this appeal is whether that action of the court was proper. . . .

Such corporations "can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association." *Spaulding v. Lowell*, 23 Pick. 71, and authorities cited in note 1, § 55, *Dill. Mun. Corp.*

The construction of a bridge across the Ohio River, to connect the city of Covington with the neighboring city of Cincinnati, in the State of Ohio, was not, under the charter as it then existed, a part of the duty of the city council of Covington, nor was the legislation sought by the council necessary to enable it to perform its corporate duties or to accomplish the purposes for which the corporation was created. True, such an enterprise might be of very great advantage to the city by invit-

ing population, enhancing the value of real estate, and in many other ways. The same might be said of the establishment of a line of ferry-boats to ply between Covington and Cincinnati, of a line of packets to ply between Covington and New Orleans, Louisville, or Pittsburg, and of a railroad connecting with any of the large cities on the Atlantic seaboard; and if the city council might lawfully appropriate the revenues of the city to procure legislation to authorize it to build a bridge over the Ohio because such a bridge would benefit the city, it might, upon the same ground, make appropriations to secure legislative authority to accomplish the other enterprises to which we have referred, and corporate expenditures might thus be increased indefinitely.

With the question whether their corporate powers should be enlarged, the corporate authorities, as such, had no concern. Their duties and powers were ascertained and fixed by the legislature which created the corporation to exercise the powers granted, and perform the duties imposed, and the city council has no authority to appropriate any of the revenues of the city except to enable it to discharge some duty imposed by law, or to accomplish some object for which the corporation was created. *Stetson v. Kempton*, 13 Mass. 271. The members of the city council, in their capacity of citizens, had a right to apply to the legislature to enlarge the powers of the corporation; but it would be dangerous in the extreme to hold that they might employ the power already granted and the money belonging to the city to obtain, through persons sent by them to appear before the General Assembly, an increase of the powers of the corporation. If the authorities of cities and towns may, at their discretion, use the corporate revenue to procure such legislation as they may deem to be in the interest of their municipalities, the worst consequences may be apprehended. Such a practice would inevitably lead to abuses, and the history of municipal corporations in this country during the last quarter of a century gives ample warning of the danger of relaxing the well established rule that municipal charters are to be strictly construed, and the powers of corporate authorities confined to such as are granted in express words, or are necessarily and fairly implied, or are essential to the objects of their creation. . . .

A. T. C.

See *preme.*

We are therefore of the opinion that the court erred in sustaining appellees' demurrer, and the judgment is reversed and cause remanded with direction to overrule the demurrer, and for further proper proceedings.¹

¹ Expenditure of funds for the purpose of attracting new residents by advertisement, etc.: see *Gamble v. Watkins*, 7 Hun, 448.

Expenditure for the purpose of influencing legislation concerning the corporate powers or existence: see *Minot v. West Roxbury*, 112 Mass. 1; *Coolidge v. Brookline*, 114 Mass 592.

Incidental
GREEN *et al.* v. CITY OF CAPE MAY †

41 *N. J. Law (Sup. Ct.)*, 45. 1879

THIS action was brought by Green & Platt, partners, to recover from the city of Cape May the price of a Babcock steam fire engine and ten fire extinguishers, alleged to have been sold by the plaintiffs to the defendants. A verdict was rendered for the plaintiffs. A rule to show cause why a new trial should not be granted was allowed by the trial judge.

For the rule, *S. H. Gray*.

Contra, *A. C. Scovel*.

REED, J. The main contention by the counsel of the defendants is, that there was no power in the defendants, the city of Cape May, to make a contract for the purchase of a steam fire engine and extinguishers. If this is so, the contract in question is *ultra vires* and invalid. In turning to the charter of the defendants (*Pamph. L.*, 1851, p. 112), we find in sections 13 and 18 the source of whatever power the defendants possess relative to contracts like the one under consideration. In section 13, among the powers conferred upon the city council is the authority to pass ordinances for the prevention and suppression of fires, and to appoint and remove fire wardens, and, by ordinance, to prescribe the power and duty of such fire wardens, and of the fire engineers and firemen. The clause in section 18 confers the right to raise money by taxation for supporting the fire engine department. There is nowhere a specific grant of power to purchase engines and apparatus. The contention, therefore, is that such power does not exist. But this contention is not tenable. The rule that an express grant of power carries with it a grant of those powers necessarily or fairly implied in or incident to the power expressly granted, is indisputable. 1 *Dill. Mun. Corp.*, § 55.

The power to suppress fires, etc., would be nugatory without the power to obtain the means by which the suppression can be effected. The authority to prescribe the power and duties of firemen and fire engineers implies that there shall be apparatus, in the management of which duties shall arise and become the subject of municipal regulation. The power to organize a fire department unaccompanied with the power to equip the department with apparatus, would be as futile as the privilege of raising an army without the power to provide weapons or subsistence. The power to do either would imply the power to effectuate the intent involved in the grant by the execution of its incidents.

The contracts for the purchase of apparatus are clearly among the incidents of the grant. The power to purchase fire engines has been, in several States, sustained under the authority of the city to make police regulations for public safety, which, it is held, confers the power

to take measures for the prevention of fires. Whether the power to suppress fires arises from the general safety clause of the charter, or from express grant, it carries with it the right to purchase fire engines. 1 *Dill. Mun. Corp.*, § 94. I therefore think the power to purchase the engine and extinguishers was in the defendants. . . .

The rule to show cause is discharged, with costs.

HOOD *et al.* ^{Limit of usage} v. MAYOR AND ALDERMEN OF LYNN *et al.**

1 *Allen (Mass.)* 103. 1861

PETITION under St. 1847, ch. 37, filed June 30, 1857, by eleven voters and taxpayers of Lynn, for an injunction to restrain the respondents from paying money from the city treasury under a vote passed June 29, by the board of aldermen and the common council of that city, appointing a committee to procure a display of fireworks on the night of the Fourth of July, and appropriating \$500 to defray the cost thereof.

After this action was brought the sum of \$312.50 was paid by the city treasurer on the warrant of the mayor, for expenses incurred under said vote; and the sum of \$187.50 remains therefor.

W. G. Choate, for the petitioners.

D. Peabody, for the respondents.

BIGELOW, C. J. . . . The general principle is well settled that municipal corporations, like other corporations aggregate, can exercise no powers other than those which are conferred on them by the act by which they are created, or such as are necessarily incident to the exercise of their corporate rights, the performance of their corporate duties, and the accomplishment of the purposes for which they are constituted. The observance of this rule, and the steady and firm enforcement of it by courts of justice, are of the highest importance. In no other way can the majority be prevented from an oppressive and reckless use of power, or the minority protected against liability for an illegal and unauthorized expenditure of the public money. It was with a view to furnish a prompt and effective remedy to restrain cities and towns from raising, borrowing, or expending money for purposes not authorized by law, and to enable a minority to guard their rights and interests, when such unlawful acts were threatened or in contemplation, that the statute of 1847, ch. 37 (re-enacted in Gen. Sts. ch. 18, § 79) was passed; by which this court has power to interfere summarily on the petition of ten taxable inhabitants, and restrain by injunction, according to the practice of courts of equity, any violation or abuse by a town or city of its legal right and power to pledge its

credit or to raise and expend money. It is under this statute that the petitioners in the present case ask for the interference of the court.

It is not pretended by the respondents that the purpose for which they appropriated the money of the city, by the vote set out in the bill, comes within any of the objects enumerated in the statutes for which towns and cities have power to grant and vote money. It is suggested, however, that it may come within the general clause by which they are authorized to raise money for "all other necessary charges." But this language has already received a judicial interpretation, and, under the broadest and most liberal construction which has ever been put upon it, we cannot see how it can be made to embrace an expenditure like that contemplated in the vote passed by the respondents. The appropriation is neither necessary to the exercise of any power expressly granted to the city; nor is it incidental to any right or authority, which, though not expressly granted, has its origin in well settled usage, and is founded upon the necessities, convenience, or even the comfort of the inhabitants. This is the extreme limit of the power of towns and cities to grant money, as settled by repeated adjudications of this court. *Stetson v. Kempton*, 13 Mass. 272; *Parsons v. Goshen*, 11 Pick. 396; *Willard v. Newburyport*, 12 Pick. 227; *Allen v. Taunton*, 19 Pick. 485; *Spaulding v. Lowell*, 23 Pick. 71; *Anthony v. Adams*, 1 Met. 284. Viewed in the most favorable light for the respondents, their vote authorized an expenditure of public money to celebrate the anniversary of a great event of national and historical interest, in a manner which might serve to amuse the inhabitants, and perhaps excite in their minds a spirit of patriotism and a love of liberty. But these objects, however laudable, do not come within the range of municipal powers and duties. If money in the treasury of a city can be expended to commemorate one event of interest and importance in the history of the country, so it may be to celebrate the anniversary of any and every other. But this court has already decided that a town cannot lawfully appropriate money to commemorate the surrender of Cornwallis, the last great act in the series of events which marked the Revolution and consummated the independence of the country. *Tash v. Adams*, 10 Cush. 252.

Nor would there be any limit to the amount of money which might be expended for such purposes, nor to the mode in which the expenditure might be made, except that which might be prescribed by the will or caprice of the majority. If fireworks and illuminations can be permitted, so may dinners, balls, and *fetes* of every description. It is obvious that such a power would open a door for great abuses, and expenditures of the most wasteful character.

It was urged by the counsel for the respondents that the appropriation in the present case might be justified and sustained on the ground of usage. But the answer to this argument is twofold. In the first place, there is no evidence in the case of the existence of any such

usage or custom in the towns or cities of this Commonwealth. It is not even alleged in the answer of the respondents. Certainly the court cannot take judicial cognizance of it. But even if such usage was alleged and proved, it would not alter the case. An unlawful expenditure of the money of a town cannot be rendered valid by usage, however long continued. Abuses of power and violations of right derive no sanction from time or custom. A casual or occasional exercise of a power by one or a few towns will not constitute a usage. It must not only be general, reasonable, and of long continuance, but, what is more important, it must also be a custom necessary to the exercise of some corporate power, or the enjoyment of some corporate right, or which contributes essentially to the necessities and convenience of the inhabitants. The usage relied on in the present case, if established, would not satisfy either of these last named requisites, which are necessary to give it validity. It was said by this court, in a recent case, that there are many things in the management of town affairs, which are done without objection and pass by general consent, which cannot, when objection is made and they are brought to the test of judicial investigation, be supported as strictly legal. *Sikes v. Hatfield*, 13 Gray, 353. The present case is an illustration of the truth of this remark.

The petitioners were guilty of no laches in commencing these proceedings. They made their application to the court seasonably, and the respondents had ample notice that their proceedings were called in question, and that the validity of their vote was to be brought to the test of judicial inquiry. The respondents therefore went on at their peril; and if they have expended the money of the city for an unlawful purpose, they must take the consequences of their own wrongful act.

Injunction made perpetual.

CITY OF WINCHESTER v. REDMOND

93 Va. 711. 1896

RIELY, J. This case is before us upon a writ of error to a judgment of the Circuit Court of Frederick County rendered against the city of Winchester, for the amount of a reward offered by its common council for the apprehension and conviction of incendiaries.

The main and important question for our determination is, Did the council have the *power* under the law to offer the reward, and bind the city for its payment?

A municipal corporation, as well as other corporations, is, in this country at least, the creature of the legislative power of the State, and its charter is its constitution and fundamental law. Upon the provisions of its charter and such other statutes of the State as are applicable to cities and towns depend the powers that are conferred upon the corporation, and that may be exercised by its council, which is its legislative body.

It possesses no powers except those conferred upon it, expressly or by fair implication, by the law which created it and other statutes applicable to it, and such other powers as are essential to the attainment and maintenance of its declared objects and purposes. It can do no act, nor make any contract, nor incur any liability, that is not thus authorized. These principles lie at the foundation of the law of municipal corporations, and are the guides in the construction and adjudication of their powers.

"It is a general and undisputed proposition of law," says a distinguished jurist and eminent commentator in his excellent treatise on this subject, "that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." 1 *Dill. Mun. Corp.* (3d ed.), § 89.

The city of Winchester is a municipal corporation, chartered by the legislature of the State. An inspection of its charter discloses that no express power was given to the corporation to offer a reward for the detection, apprehension, or conviction of offenders against the criminal laws of the State. Nor does any statute of the State confer upon municipal corporations such authority.

But it is claimed that the exercise of such power is authorized by section 9 of the charter of the city, which, after conferring upon the council a number of particular powers, authorizes it "to do all such things as it may deem proper for the prosperity, quiet, and good order of the city." This language, though very broad, is yet not without its proper limitation. It is to be construed with reference to the object contemplated by the State in the grant of the charter, and the extent of the power it confers is to be measured and limited by the purposes for which the corporation was created.

A municipal corporation is a local and subordinate government, created by the sovereign authority of the State, primarily to regulate and administer the local and internal affairs of the city or town incorporated, in contradistinction to those matters which are common to and concern the people at large of the State. And it is only in regard to the local and internal affairs of the city or town that its council,

unless expressly authorized, has the right to legislate. To this end, specific powers are usually given in express words, and when a general and indefinite power, as the one under consideration, is superadded, it is to be confined in its exercise to the ordinary objects and purposes of municipal corporations, and not to be construed to comprehend a matter which is common to the State and affects its people at large. The line of distinction may not always be perfectly clear. Cases doubtless do sometimes arise, when it is not readily perceived whether the power exercised by the council of a city or town is implied in the powers expressly given or is necessary to the accomplishment of the objects and purposes of the corporation, or whether it is wholly a State power, and only to be exercised by its legislature; but, as respects the particular case before us, there is no such difficulty. Here, the line of distinction is clearly and broadly marked.

Crime is an offense against the State, and not against the city, town, or county in which it may be committed, as distinguished from the rest of the State. The offense is against the sovereign authority, and not against the individual or particular community. All the people of the State are concerned in the punishment and suppression of crime. And the State, whose prerogative it is to punish crime, has made adequate provision for the vindication of the public justice. When a crime has been committed, it is her law, and not that of the corporation, that is broken. She has prescribed penalties for the various species of crime, and enacted laws for the arrest, trial, and punishment of criminals. They are arrested by her officers, and tried by her judiciary under her laws.

The State constantly makes use of officers of the corporation in the discharge of its governmental functions, and requires them to perform, within the corporate limits, duties not strictly or properly local or municipal in their nature. In the performance of such duties, they exercise State powers, and are in that respect State officers. As was said by Judge Staples in *Burch v. Hardwicke*, 30 Gratt. 24, 34: "When the mob rages in the streets, when the incendiary and assassin are at work, they do not offend against the city, but against the State. When they are detected and arrested, it is by the chief of police and his subordinates, under the authority of the State laws, and as an officer of the State; and when they are tried and convicted, it is by officers representing the State and her sovereign power." . . .

The decisions upon this question have not been uniform. It has been held by some courts (*Crawshaw v. Roxbury*, 7 Gray, 374, and *York v. Forscht*, 23 Pa. St. 391) that municipal corporations possess the authority to offer rewards for the apprehension and conviction of offenders against the criminal law, but the existence of the power has been oftener, and we think correctly, denied by courts of equal dignity and respectability. *Croft v. City of Danbury*, 65 Conn. 294; *Hanger v. City of Des Moines*, 52 Ia. 193; *Abel v. Pembroke*, 61 N. H. 359; *Gale*

v. *So. Berwick*, 51 Me. 174; *Butler v. City of Milwaukee*, 15 Wis. 493; *Patton v. Stephens*, 14 Bush, 324; *Murphy v. City of Jacksonville*, 18 Fla. 318; and *Baker v. City of Washington*, 7 D. C. 134. . . .

Reversed.

2. Police Power

VANDINE, PETITIONER *

6 Pick. (Mass.) 187. 1828

PETITION for a writ of *certiorari* to the Municipal Court of Boston.

Vandine was prosecuted under a by-law of Boston, passed in April, 1826, which prohibited any person not duly licensed by the mayor and aldermen from carting house-dirt, refuse, and offal from the dwellings and buildings of the city through the streets. At the trial, the violation of the terms of the ordinance was proved, and it was agreed that Vandine was an inhabitant of the town of Cambridge. Exceptions were taken by the petitioner to instructions given to the jury.

Dunlap, in support of exceptions.

Curtis, contra.

PUTNAM, J. The first objection is that this by-law is not binding upon strangers, if it should be considered as binding upon the citizens of Boston.

Some by-laws are binding upon strangers as well as upon the inhabitants or members of the corporation, and some are not. The distinction is between corporations united as a fraternity for the purposes of business, having no local jurisdiction, and corporations having a territorial jurisdiction; the former have not, but the latter have power to make by-laws binding upon strangers.

For example: a by-law of the corporation of Trinity House, "that every mariner, within twenty-four hours after anchorage in the Thames, put his gunpowder on shore, does not bind, because the corporation has no jurisdiction upon the Thames." Com. Dig. *Bye-Law*, ch. 2.

In the case of *Dodwell v. The University of Oxford*, 2 Ventr. 33, the Chancellor's Court of the University made a by-law, that whoever, privileged or not privileged, should be taken walking in the streets at nine o'clock at night, having no reasonable excuse by the proctor, etc., should forfeit, etc. And it was held that the corporation could not make a by-law binding upon any who were not of their body. They went beyond their jurisdiction, which could not be considered as extending to the inhabitants of Oxford who were not scholars. Regard is to be had to the nature of the incorporation; if it is a banking incorporation,

for example, their by-laws must be confined to the proper mode of conducting their affairs. Where the corporation has a local jurisdiction, their by-laws affect all who come within it; for example, the by-law of the city of London, that no citizen, freeman, or stranger should expose any broad-cloth to sale within the city before it should be brought to Blackwell Hall to be examined whether it were salable or not, was held binding upon strangers as well as citizens. 5 Co. 63.

So in *Pierce v. Bartrum*, Cowp. 269, a by-law of the mayor and common council of the city of Exeter, that no person should slaughter beasts or keep swine within the walls of the city, was held good against the defendant, who was not free of the city, but only residing there. He was considered as an inhabitant *pro hac vice*. So where the corporation have jurisdiction over all of the same trade or profession within certain limits, as the College of Physicians have for seven miles round London; whose by-laws regulating the practice of physic are binding upon all within those limits.

The by-laws which are made by corporations having a local jurisdiction are to be observed and obeyed by all who come within it, in the same manner as aliens and strangers within the Commonwealth are bound to know and obey the laws of the land, notwithstanding they may not know the language in which they are written. They receive the benefits arising from the municipal arrangements, and are presumed to assent to them, upon the same principle which requires from them a temporary allegiance to the State for the protection it affords to them during their residence.

But it is contended that this by-law is void as it is in restraint of trade, and operates as a monopoly. Every regulation of trade is in some sense a restraint upon it; it is some clog or impediment, but it does not therefore follow that it is to be vacated. If the regulation is unreasonable, it is void; if necessary for the good government of the society, it is good. . . .

The direction and opinion of the judge of the Municipal Court was entirely correct.

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Conviction under

Subj. STATE v. LEE

29 Minn. 445. 1882

VANDEBURGH, J. The defendant was indicted and tried in the district court of Ramsey County, at the October term, 1881, for the offense of keeping a house of ill-fame, resorted to for the purpose of prostitution. Upon the trial the defendant offered to prove, under a plea of former conviction, that she had been duly convicted of the same offense

under an ordinance of the city of St. Paul. The principal question to be considered here is whether the court erred in rejecting this evidence. The same question was considered in *State v. Oleson*, 26 Minn. 507, and it was held by a majority of the court, as then constituted, that such former conviction was no bar to the State prosecution, though the justices rested their conclusions upon different grounds. The decision was nevertheless an authority which properly governed the district court in its decision. But the division in opinion in that case requires a reconsideration of the question in this.

It is the judgment of a majority of the court that the law of the State which punishes this offense as a felony, has not been superseded by the charter and ordinance of the city, but that the jurisdiction of the State to try the offense remains wholly unaffected and unimpaired; that the State has not surrendered or delegated to the municipality the power to punish it as a crime against the Commonwealth; that the general law and the local ordinance must stand together; and also that a conviction under the latter must be adjudged to be no bar to a prosecution under the former. Though this last proposition was not directly decided in *State v. Charles*, 16 Minn. 474, and *State v. Ludwig*, 21 Minn. 202, yet we think the opinion in each case contains a clear intimation in support of the doctrine.

Municipal corporations are chartered and vested with the powers of a local government, in addition to the powers exercised by the State under the general laws, because the concentration of population and business in a particular locality requires special police regulations, with the power in the local jurisdiction to enforce them in a summary way. *Waldo v. Wallace*, 12 Ind. 569, 584. Hence these powers, in so far as they relate to the public order and morals, must be regarded as purely municipal in their character, to be exercised through such police regulations, and in no sense a substitute for the administration of the general criminal laws of the State through its own tribunals, except where the legislature plainly so provides. Says Mr. Cooley: "An act may be a penal offense under the laws of the State, and further penalties under proper legislative authority be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other." *Cooley, Const. Lim.* (4th ed.) 242.

It is usual to give the local courts in such cases jurisdiction, also, over inferior offenses under the general laws. And as to such offenses their proceedings and judgments are on the same footing with those of other State courts of similar jurisdiction. In some instances, also, from the nature of the case and the terms of the charter, it may be reasonably implied, particularly as to minor offenses, properly of police or municipal cognizance (as frequently in the case of liquor licenses), that the enforcement of the municipal by-law is intended to supersede and bar prosecutions by the State. How far the legislature might authorize the corporation to prohibit and punish, under its own by-laws,

criminal offenses under the general laws, or how far such by-laws might be substituted by charter provisions for such general laws, is not necessary to be discussed in this case, because nothing of the kind is attempted in the charter under consideration. Such legislation, if indeed permissible, is not usual, however, as to the higher grades of offenses. *Howe v. Treasurer of Plainfield*, 37 N. J. Law, 145; *Com. v. Turner*, 1 Cush. 493.

An offense against a municipal by-law, proceeding from the same act which also constitutes a felony under the general law, is not for that reason to be considered the same offense, because the two are distinct in their legal character, both as to the nature and quality of the offenses and the jurisdictions offended against; and a former conviction, to be a bar, "must be upon a prosecution for the same identical act and crime." 4 *Bl. Com.*, 336; *Wragg v. Penn Township*, 94 Ill. 11; *Freeland v. People*, 16 Ill. 380; *Severn v. People*, 37 Ill. 414. The terms "by-law," "ordinance," and "municipal regulation" have substantially the same meaning, and are defined "to be the laws of the corporate district, made by the authorized body, in distinction from the general law of the State." They are local regulations for the government of the inhabitants of the particular place. 1 *Dill., Mun. Corp.* (2d ed.), §§ 244, 300. The authority to make "by-laws" is a widely different thing from the general power to make "laws." *Com. v. Turner, supra*. Such by-laws, though given the force of law by the charter for the purposes of the municipal government, yet relate to that solely, and prosecutions for their violation have no reference, as a general rule, to the administration of criminal justice by the State. *Mayor v. Rouse*, 8 Ala. 515. The term "police," as used to define the character of such regulations and prosecutions, is used in its limited sense and more common acceptation, as relating to public order, health, etc. The term "crime" or "public offense," as used in the general laws, is not understood as referring to the so-called offenses against a municipal government. Gen. St. 1878, ch. 91, § 1 *et seq.*; *City of Kansas v. Clark*, 68 Mo. 588. By the constitution of the State of Iowa it is provided that all "prosecutions shall be conducted in the name and by the authority of the State." It was held that this applied only to prosecutions for violations of the criminal laws of the State, and that it was not intended that the State should be a party to petty prosecutions under the police regulations of a municipal corporation. *City of Davenport v. Bird*, 34 Ia. 524; *City of Emporia v. Volmer*, 12 Kan. 622. And where by the terms of a city ordinance it is provided that its violation shall be punished by the infliction of a pecuniary penalty enforced by imprisonment, the procedure in the name of the city, though commenced by warrant and criminal in form, is usually held *quasi* criminal rather than criminal in character, on the ground that it is not properly a crime against public law. *Ex parte Holwedell*, 74 Mo. 395; *City of Kansas v. Clark, supra*; *President, etc., v. McKernan*, 54 Wis. 487; *Williams v. City Council*, 4 Ga. 509; *Williamson v. Com.*, 4 B. Mon.

146; *City of Goshen v. Croxton*, 34 Ind. 239. The doctrine is also maintained that trial by jury may be withheld in cases of summary trials in police courts. *Byers v. Com.*, 42 Pa. St. 89; *Howe v. Treasurer of Plainfield*, *supra*; *Dill. Mun. Corp.* (2d ed.), § 361, note.

These several classes of cases are instructive as serving to illustrate the nature of the municipal jurisdiction, and the legitimate purpose of prosecutions under municipal ordinances. Offenses against them require summary treatment, and no great stress is laid upon the form of the procedure. Severe penalties would, from the nature of the case, seem to be inappropriate to such summary trials. Nor are they followed by the odious consequences which usually attach to convictions upon the more solemn trials for offenses under the general laws. The city ordinance does not have respect to the guilt or moral turpitude of the act constituting the offense considered as a crime, but only to the purposes of a police regulation. *Shafer v. Mumma*, 17 Md. 331. In England and many of the older States, where the procedure usually takes the form of penal actions for the recovery of fines, the question in dispute here could not arise. The confusion and difficulty have arisen out of the form and nomenclature given to the proceedings under such by-laws. And yet they remain the same in substance, and the distinction is more nominal than real. The same municipal needs require the same police remedies. They are styled criminal even where in fact only *quasi* criminal, and offenses designated in the charter as "offenses against by-laws" come to be classed in common usage with crimes and public offenses under the constitution and laws of the State. *Wiggins v. City of Chicago*, 68 Ill. 372.

One who has been imprisoned in pursuance of a judgment in bastardy proceedings, criminal in form, though not in fact (*State v. Becht*, 23 Minn. 1), and who has also been punished for the same act under the criminal laws of the State; or one who has been mulcted in damages to the injured party, and has also suffered the penalty of a breach of the peace, may be said in common parlance to have been punished twice. So, in one way or another, in order to render them effectual, the infliction of penalties is resorted to, to enforce municipal regulations, and offenders against them are punished, not for a public offense, of which the municipal authorities cannot take jurisdiction, and with which they have no concern, but for an offense against a by-law cognizable by them alone. One who is within the limits of the municipal jurisdiction must not only obey the laws of the State, but also adjust his conduct to the requirements of the local by-laws. And an act which, outside a city, would subject him to punishment by the State only, committed inside the limits, by reason of the place and the consequent aggravation attending it, will render him liable also to the additional penalty. The same act, prohibited by both the city and the State, may thus constitute two offenses, which are intrinsically and legally distinguishable. In support of this proposition the authorities are abundant and nearly

unanimous. *Waldo v. Wallace*, 12 Ind. 569; *Wragg v. Penn Township*, 94 Ill. 11; *Robbins v. People*, 95 Ill. 175; *Greenwood v. State*, 6 Baxter (Tenn.), 567; *State v. Williams*, 11 S. C. 288; *Howe v. Treasurer of Plainfield*, 37 N. J. Law, 145; *Mayor v. Allaire*, 14 Ala. 400; *Hamilton v. State*, 3 Tex. App. 643; *Shafer v. Mumma*, 17 Md. 331; *State v. Sly*, 4 Oregon, 277; *State v. Bergman*, 6 Oregon, 341; *City of Brownsville v. Cook*, 4 Neb. 101; *McLaughlin v. Stephens*, 2 Cranch C. C. 148, approved in *Polinsky v. People*, 11 Hun, 390. The text writers, Cooley, Dillon, and Bishop, concur in the same conclusion. We think the authorities on the subject altogether too respectable and weighty to be disregarded.

The analogy frequently suggested in the case of an offense against a State and the United States, growing out of the same act, though not complete, yet serves as an illustration of a distinction constantly recognized between offenses against municipal and general laws. . . . Though its authority is derivative and local, the municipal corporation may be considered a separate government under its charter, which, subject to the general laws, stands for its constitution. . . .

The plea in this case shows that the defendant had been previously convicted regularly once a month under the city ordinance in question, from the time laid in the indictment, in May, to October, inclusive. Now, since the municipal court is open every week-day, and it is presumed that the officers in the discharge of their duty will be vigilant in detecting and promptly reporting and arresting offenders, it is likely that in this class of cases the summary conviction before the magistrate will ordinarily anticipate the action of the grand jury; so that, if the State is barred by the local prosecution, it would work a practical repeal of the statute in its operation in all the localities where the offense most prevails, taking into account the cities and villages organized under the general laws as well as under special charters. "The result of which is," as Mr. Bishop remarks, "that the by-law would repeal the general law for the cases in which the prosecution is first had under it." As also said in *Robbins v. People*, 95 Ill. 175, 177, "the effect would be a material abridgment of the punishment which the statute imposes," and "we cannot allow that a city has power, through an ordinance, to repeal or essentially modify the statute." While we do not base our opinion upon the necessities of the case, yet these considerations are entitled to their proper weight in the discussion, and strengthen the argument in support of the conclusion we have arrived at in this case as to the nature and effect of prosecutions under city by-laws. And we think such has been the construction of the courts of nearly all the States where the question has arisen, extending back for fifty years, and the common understanding on the subject with which charters have been granted, and the sense in which they have been accepted and acted on by the people, and that such practical construction of the law is entitled to great weight. *Village of Platterville v. Bell*, 43 Wis. 488, 493; *City of Faribault v. Misener*, 20 Minn. 396.

All the other questions raised in this case were fully considered and determined in the case of *State v. Smith, ante*, [29 Minn.] p. 193, submitted at the same term.

The order should be affirmed.¹

[BERRY and MITCHELL, JJ., delivered opinions concurring.]

GILFILLAN, C. J., *dissenting*. I dissent upon the grounds stated by me in the case of *State v. Oleson*, 26 Minn. 507.

¹ In *People v. Hanrahan*, 75 Mich. 611, beginning at 617 (1889), CHAMPLIN, J. J., said: "There is a great want of harmony in the decisions of the courts of last resort in the several states upon the power of municipalities to enact ordinances covering some subject of the criminal laws of the State, and the effect of a prosecution under such ordinances as a bar to a prosecution under the state law. . . ."

"One of the strongest arguments to which my attention has been called against the exercise of this power by a municipality in cases of a criminal nature is that the criminal laws of the State ought to be uniform in the elements which go to constitute the crime, the penalty or punishment imposed for the commission of the offense, and in forms and mode of procedure to prosecute the offender; that it is the province of the Legislature to declare what shall constitute crime, and to prescribe punishment therefor; that an offense against the criminal laws of the State is the same offense in whatever locality it is committed, and should subject the offender to the same punishment."

"But these considerations are not fundamental. The Legislature has power to declare that certain acts committed in a particular locality shall constitute a criminal offense, and shall be punished as a felony, while the same act, if done in another locality or section of the State, would not be a criminal offense at all. Such are the laws which prohibit fishing in certain waters, and many other laws which the Legislature declares shall only be operative in certain designated portions of the State."

"There is no provision in our Constitution, as there is in some of the states of the Union, that all laws shall be uniform and equal throughout the State, and consequently the Legislature is not prohibited from legislating for particular localities."

"Another argument has been urged with great force. It is asserted that the clause in the Constitution which authorizes the Legislature to confer upon organized townships, incorporated cities, and villages, and upon the board of supervisors, such power of a local, legislative, and administrative character as they may deem proper, only appertains to such local, legislative, and administrative matter as municipalities had been in the habit of exercising from time immemorial; that these include only the ordinary and reasonable by-laws which incorporated cities and villages had been accustomed to enact for the preservation of good order in their local communities, to be enforced by the infliction of penalties and fines in a civil action, without power of imprisonment for breach of such by-laws."

"It is claimed that it would be absurd to assert that the Legislature could authorize an organized township to enact criminal laws to be enforced in such township, or for a board of supervisors to do the same thing; that the doctrine, carried to its logical results, would authorize each township in the State, and each county to have its own code of criminal laws, differing from the others; that neighbors whose farms adjoined, or whose residences were separated by a highway, if residing in different townships, would be subject to different criminal laws; that it would be difficult to imagine the internecine strifes and bitterness that would be engendered by such a state of affairs. . . ."

"Common experience, and the necessities of our civilization, have shown that the grant to and exercise by cities and villages of such power to enact ordinances, and to punish for their violation, have been both wise and just, and have not operated oppressively upon the citizen. It is no reason why this power should not be delegated to cities and villages, that, if it should be also delegated to organized townships, it might be abused, and result in internecine strifes and altercations. If it should be attempted, and result in wrong or oppression to the people, the remedy is in their hands. The legislators are chosen by them, and it is in their power to effect any needed reform. Besides, it is quite unlikely that any such event should ever happen, as no necessity exists therefor."

"The word 'crime' is applicable to both a felony and 'misdemeanor.' So the words 'offense' and 'crime' are synonymous, when applied to convictions for violations of statutes of a public nature. *People v. N. Y. Police Commissioners*, 39 Hun, 507; *People v. French*, 102 N. Y. 583 (7 N. E. Rep. 913). The words are used interchangeably in our compilations. Whenever a person does an act which is prohibited by law, which act is punishable by fine, penalty, forfeiture, or imprisonment, he commits a crime."

DICKINSON, J., *dissenting*. I dissent from the opinion of the court. I think the ordinance is valid, having the force of, and being in reality, a law of the State, enacted pursuant to authority conferred by the legislature. Both in the creating of the ordinance, and in the prosecution for its violation, the sovereign power of the State was exercised, and the prosecution and conviction constituted a defense to a subsequent indictment for the same act. It is not important that the legislature did not intend that such should be the result of an enforcement of the ordinance. The law having been created, and executed in the conviction and punishment of the offender, the constitution forbids a second prosecution. "No person, for the same offense, shall be put twice in jeopardy of punishment."

Proceeding under indictment by State Court

JUDY v. LASHLEY †

50 W. Va. 628. 1902

APPLICATION for a writ of prohibition to restrain defendant, the mayor of the town of Davis, from proceeding against the petitioner on a charge of carrying a deadly weapon in violation of an ordinance of the town, and from attempting to collect the fine provided for in the ordinance.

The ordinance makes it unlawful "for any person to carry about his person, any revolver or other pistol, dirk or bowie knife, razor, slung shot, billy, metallic or other false knuckles or any other dangerous or deadly weapon," etc., and prohibits the sale of such weapons to minors.

Chapter 47 of the Code empowers councils of municipal corporations "to protect the persons and property of the citizens of such city, town, or village, and to preserve peace and good order therein;" and provides that, "To carry into effect these enumerated powers," etc., "the council shall have power to make and pass all needful orders, by-laws, ordinances, resolutions, rules and regulations, not contrary to the constitution and laws of this State," and to prescribe penalties.

W. H. Kelly, for petitioner.

Cunningham & Stallings, for respondents.

POFFENBARGER, J. . . . It is urged for the petitioner that chapter 47 of the Code does not authorize a municipal corporation to punish acts already made criminal under the State law, and that the ordinance making the carrying of deadly weapons an offense punishable by the municipal authorities is void. . . .

The offense, in question here, is clearly an offense against the peace. It is not only so regarded, but is so classed by chapter 148 of the Code.

Unless the ground taken by the petitioner that the power, thus delegated by the legislature, does not include the right to punish acts already made criminal under the State law, is tenable, it is manifest that the town may, by ordinance, declare the carrying of deadly weapons an offense and punish it, for it is expressly given power to preserve peace and good order within its limits.

On this question there is much conflict in the decisions of the various States. In New York and Alabama and Missouri and some other States it has been held that, under a general authority delegated by the legislature, such as to preserve the peace and regulate the police, a municipal corporation may impose penalties for the commission of acts which, by the State law, are declared to be crimes. *Rogers v. Jones*, 1 Wend. (N. Y.) 261; *Mayor of Mobile v. Allaire*, 14 Ala. 400; *Mayor v. Rouse*, 8 Ala. 515; *Intendant of Greensboro v. Mullins*, 13 Ala. 341; *Amboy v. Sleeper*, 31 Ill. 499; *State v. Crummey*, 17 Minn. 72; *Brownsville v. Cook*, 4 Neb. 101; *Lerry v. State*, 6 Ind. 281; *St. Louis v. Bentz*, 11 Mo. 61; *State v. Gordon*, 60 Mo. 383. In some of the cases it is further held that a conviction under an ordinance may be pleaded in bar of a prosecution in the State court for the same act. *State v. Cowan*, 29 Mo. 330. This is on the ground that the constitution forbids that a person shall be twice punished for the same offense. There is another class of cases which hold that the party may be punished under both the State and the municipal law. *Fox v. State*, 5 How. (N. Y.) 410; *Moore v. People*, 14 How. (N. Y.) 13; *Slaughter v. People*, 2 Doug. (Mich.) 334. In some other States it is held that a State cannot punish, by ordinance, what is already an offense by the statute. *State v. Keith*, 94 N. C. 933; *In re Sic*, 73 Cal. 142; *Menken v. Atlanta*, 78 Ga. 668. *Cooley, Const. Lim.* 239 says: "Nor will conferring a power upon a corporation to pass by-laws and impose penalties for the regulation of any specified subject necessarily supersede the State law on the same subject, but the State law and the by-law may both stand together if not inconsistent. Indeed, an act may be a penal offense under the laws of the State, and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other." It will be noticed that Judge Cooley says these penalties may be imposed under proper legislative authority. From this it is clear that he does not mean to say that such corporations have any inherent power, or power of themselves, to punish acts which are punishable under the State law. He does not pursue the question as far as does Judge Dillon who says, at § 367 of the 4th edition of his work on *Mun. Corp.*: "Questions of difficulty have arisen in consequence of grants of power to municipal corporations to make ordinances respecting matters and acts already regulated by general statute, and, if criminal in their nature, punishable under the laws of the State. Hence, the same act comes to be forbidden by general statute and

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by the ordinance of a municipal corporation, each providing a separate and different punishment. The same transaction may, if complex in its nature, be in one part of it an offense against the general law, and in another against the by-law; but such cases present no difficulty. But can the same act be twice punished, once under the ordinance and once under the statute? The cases on this subject cannot be reconciled. Some hold that the same act may be a double offense, one against the State and one against the corporation. Others regard the act as constituting a single offense, and hold that it can be punished but once, and may be thus punished by whichever party first acquires jurisdiction." In the next section the author presents his own conclusion, deduced from the authorities, as follows: "Where the act is, in its nature, one which constitutes two offenses, one against the State and one against the municipal government, the latter may be constitutionally authorized to punish it, though it be also an offense under the State law; but the legislative intention that this may be done ought to be manifest and unmistakable, or the power in the corporation should be held not to exist. Where the act or matter covered by the charter or ordinance, and by the State law, is not essentially criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language which would not be sufficient were the matter one not specially relating to corporate duties, and fully provided for by the general laws. Such are the general principles to be extracted from the authorities."

It is evident that the exercise of such municipal power cannot extend to the whole range of acts made criminal by the State law. There must be a limit, and in the cases, holding that double punishment may be inflicted, under an indefinite delegation of power, the acts in question were generally those constituting the milder offenses under the State law. Usually they are such as bear a direct relation to or are fairly to be included within the terms of the power delegated to preserve peace and good order. This is well stated by Lumpkin, Judge, in *Mayor of Savannah v. Hussey*, 21 Ga. 86, "Can a municipal corporation legislate *criminaliter* upon a case fully covered by a State law?"

"I am aware that decisions may be found to support the affirmative of the foregoing propositions. 1 Wend. 237; 16 Ala. Rep. 400; 8 *ib.* 515; Bay. Rep. 382; 11 Mo. 61; 12 B. Munroe, 25. Without stopping to investigate the applicability of these precedents, to the point under inquiry, I ask, What limit will you set to this power? If it may legislate by an ordinance for any one offense, may it not for every crime embraced within the penal code? Arson in a town or city is provided for by the public law; why not pass a by-law prescribing

another mode of trial, and a different punishment for the same offense if committed within their limits. So of the crimes of forgery, counterfeiting, perjury, etc. Such, I am sure, has not been the understanding of the country.

cl. Arson
"Under the general grant of power delegated by the Act of 1849, the city authorities may cover all cases not provided for by the paramount authorities of the State. Their code already fills a volume of some five hundred pages. All those ordinances regulating cemeteries, commons, markets, vehicles, fires, exhibitions, lamps, licenses, water-works, watch, police, city taxes, city officers, health, nuisances, etc., are legitimate and proper. Nay, I might go further, and concede, that where the State law defines an offense generally, and prescribes a punishment, without reference to the place where it is committed, in town or country, and the act when committed in the streets and public places of the city would be attended with circumstances of aggravation, such as an affray, for instance, the corporate authorities with a view to suppress this special mischief, might probably provide against it by ordinance; because that ingredient or concomitant of the crime might not be supposed to be included in the State law. And this is going quite far enough."

This seems to be a conservative position on the question and one which extends to municipal corporations all power that is necessary, supplemented by the State law, which extends throughout all cities, towns, and villages of the State, to fully protect the interest and give complete exercise of all the police power of the State within municipal corporations. What more is needed? What good reason can be assigned for extending greater power when the statute does not specifically and expressly grant it? So remote from a breach of the peace is the carrying of weapons that at common law it was not an indictable offense, nor any offense at all. *5 Am. & Eng. Ency. Law* (2d ed.), 729. The legislature has empowered the municipal corporations of this State to preserve peace and good order therein, but the carrying of weapons, although having a remote tendency to a breach of the peace, is more objectionable on the ground of its danger to life and limb of the citizens of the State. It is probably on that account more than any other that it is made a statutory offense in nearly all of the States of the Union. It seems to be of such character as to be clearly without the limited and indefinite power conferred upon municipal corporations in this State. It would be just as reasonable to say that that power extends to the punishment of petit larceny and arson, under the power given to protect the property of the citizens, but no such authority is claimed or exercised by our municipal corporations. It is left to the jurisdiction and cognizance of the State courts. For these reasons, and under these principles, the ordinance of the town of Davis, in reference to the carrying of deadly weapons and punishment therefor, must be held invalid, and the mayor is without jurisdiction to take cognizance as mayor of the offense charged.

This position must not be confounded with the position announced in *Moundsville v. Fountain*, 27 W. Va. 182, and *Jelly v. Dils*, 27 W. Va. 267, holding that municipal corporations may punish for unlawful re-tailing of spirituous liquors, etc. The statute expressly gives power to such corporations to impose license taxes upon the privilege of making such sales, from which it results that the council must have power to enforce its regulations. That is a very different matter from the case under consideration. . . .

Writ awarded.

Sunday closing is inconsistent with the State policy
 CITY OF CANTON v. NIST

9 Ohio St. 439. 1859.

DEFENDANT was convicted and fined, before the mayor of Canton, for having opened his grocery on Sunday in violation of an ordinance of that city passed in 1854. The second section of the ordinance forbade the owners or occupants of shops, etc., from opening them for business, and from opening their shutters, on Sunday; but provided that it should not be construed to forbid tavern-keepers to entertain travelers, or druggists to make up prescriptions.

The Court of Common Pleas reversed the judgment, and the city now assigns that reversal for error.

B. F. Leiter and Thomas Goodman, for plaintiff in error.

Louis Schaefer, for defendant in error.

SCOTT, J. The statute relied upon by counsel, as conferring the power claimed for the city council, is the 33d section of "an act to provide for the organizations of cities and incorporated villages," which gives to such corporations the "power to make and publish such by-laws and ordinances, as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof." *Swan's Stat.* 964.

But the powers here conferred are expressly limited, in the preceding part of the same section, to such ordinances as are "not inconsistent with the laws of this State." And this limitation, even if not expressed, must, doubtless, be regarded as implied in all such general grants of power; for it must be presumed that the legislature would not intend to give to a corporation the power of contravening and defeating State policy by ordinances inconsistent with the laws of the State. Is, then, the second section of this ordinance consistent with the policy of the State as indicated by her legislation?

By a statute of this State, entitled "an act for the prevention of

certain immoral practices," passed in 1831, and still in force, it is enacted in the first section: "That if any person, of the age of fourteen years or upward, shall be found, on the first day of the week, commonly called Sunday, sporting, rioting, quarreling, hunting, fishing, shooting, or at common labor (works of necessity and charity only excepted), he or she shall be fined in a sum not exceeding five dollars, nor less than one dollar: Provided that nothing herein contained shall be construed to extend to those who conscientiously do observe the seventh day of the week as the Sabbath; nor to prevent families emigrating from traveling," etc. The penalty imposed by this section clearly indicates the general policy of discriminating between secular days and Sundays, and of regarding the latter as a day of rest, upon which common labor, sports, and the employments therein named, are prohibited. But the *exceptions* which it contains are equally expressive of State policy. The statute proceeds on the principle that works of *necessity* may be performed on any day; that "it is lawful to do good, even on the Sabbath day;" and upon the further principle that persons who conscientiously observe another day of the week as the Sabbath shall not be required to abstain from employments, otherwise lawful, on Sunday.

The ordinance in question contains no such general exceptions, in favor of necessity, charity, or creeds. It attempts to compel the observance of Sunday by Jew and Christian alike. It punishes, by fine, the opening of any shop, store, etc., or the shutters thereof, for the purpose of business, upon Sunday, without regard to the necessity, or the charity which may have required business to be done. Tavern-keepers and druggists alone are exempted from its operation.

It does not appear, from the record in this case, that the defendant is a person who conscientiously observes the seventh day of the week as the Sabbath; but be that fact as it may, such a plea must have been unavailing if the second section of this ordinance be valid. But, in ignoring the statutory exceptions to which we have referred, and in assuming to punish acts which the statute, by clear inference, authorizes, the ordinance becomes inconsistent with the laws and policy of the State; and must, as to this section, be declared void. We are constrained so to hold, however sensible we may be of the duty to sustain municipal corporations in the legitimate exercise of the powers conferred on them, for the preservation of order, and improvement of morals, within their jurisdictions.

Judgment of the Court of Common Pleas affirmed.

Ex parte HONG SHEN 98 Cal. 681. 1893

APPLICATION to the Supreme Court for a release from imprisonment upon a writ of *habeas corpus*.

PATERSON, J. The petitioner was convicted in the police court of the city and county of San Francisco of selling opium without a physician's prescription under order No. 2085 of the board of supervisors, approved July 18, 1889. Section 1 of the ordinance provides that "It shall be unlawful for any apothecary . . . or any person whatever to sell . . . to any person in the city and county of San Francisco any opium . . . except upon written prescription or written order of a practicing physician, as provided in this order, and except upon the day of the date of said prescription or order." Section 2 of the order provides that every person selling opium, etc., must keep a book, and record therein the sale, the name, age, sex, color of the person receiving the poison, the name and quantity thereof, as well as the name of the physician and the name and residence of the patient, and that there shall be attached to the bottle or parcel containing the article the name thereof, together with the name of the physician, the name of the druggist or other person who sells the article, and his place of business. Section 3 provides that the prescription or order must be dated and signed by a physician, who must be a graduate in medicine, with a diploma from a regularly constituted medical institution, and must contain the name and residence of the patient and the residence or office of the physician. Section 9 makes it a misdemeanor to violate any provision of the order, punishable by fine not exceeding five hundred dollars, or by imprisonment not exceeding six months, or by both such fine and imprisonment.

An act to regulate the sale of certain poisonous substances approved April 16, 1880, provided that it shall be unlawful for any person to retail certain poisons, including opium, without labelling the bottle or other package, with the common name of the article, together with the word "poison," and the name and place of business of the seller. The act makes it unlawful for any person to retail any of the poisons named, unless upon due inquiry it is found that the person receiving the same is aware of its poisonous character, and that it is to be used for a legitimate purpose. The act also requires a record to be kept stating substantially the facts required by the order above named, and in addition thereto, requires the seller to ascertain whether the name and address given by the person receiving the poison are the true name and address, and for that purpose to insist upon the person being identified. Any violation of this act is made a misdemeanor, and is punishable as such. Stats. 1880, p. 102.

An act to regulate the practice of pharmacy and sale of poisons in the State of California, approved March 11, 1891, contains substantially the same provisions as those found in the act last above referred to, and in addition thereto provides that said provisions "shall not apply to the dispensing of poisons when prescribed by practitioners of medicine, nor to the sale of poisons if a single bottle or package does not contain more than an ordinary dose." The act provides that any person failing to comply with the requirements aforesaid shall be guilty of a misdemeanor, and upon conviction shall be liable to a fine not exceeding fifty dollars. Stats. 1891, p. 88.

It will be seen from the provision above referred to, that the State and municipality have both legislated upon the same subject. The State has endeavored to regulate the sale of certain poisons by requiring the seller to make certain inquiries and keep a record of certain facts, but it is not provided that opium cannot be sold except upon prescription of a physician furnished by the purchaser. In this respect the order of the board of supervisors goes beyond the requirements of the statute, and the question is whether or not the board have the right so to legislate upon the subject.

There is no doubt that municipal by-laws may stand if not inconsistent with State laws, and that the by-law is not necessarily void simply because the legislature has regulated the same subject by law; but it must be in harmony with the general laws of the State and with the provisions of the municipal charter. "Whenever they come in conflict with either, the by-law must give way." *Cooley, Const. Lim.*, 6th ed., p. 239.

Our constitution provides that "any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." (Art. XI., sec. 11.) It is claimed by the petitioner that, inasmuch as the legislature has regulated the sale of certain poisons, including opium, by the acts above referred to, it is not within the power of the board of supervisors of the city and county of San Francisco to make another regulation or to prohibit the sale of opium; that an ordinance is in conflict with the general laws when it makes another and different regulation for the sale of an article of commerce than that provided by a statute of the State.

The soundness of this contention we cannot admit. There may be different regulations without a conflict. The revised statutes of the State of New York provide that "no keeper of an inn, tavern, or of any ale-house, or porter-house, or grocery, nor any other persons authorized to retail strong or spirituous liquors, shall, on Sunday, sell or dispose of any ale, porter, strong or spirituous liquors, excepting to lodgers in such inns or taverns, or to persons actually traveling, in the cases allowed by law." The ordinance of the city of Brooklyn provided that no person should sell or dispose of any ale, porter, strong or spiri-

tuous liquors in said city on Sunday. It was claimed that the common council had exceeded the power conferred upon it in passing this ordinance, because the charter of the city authorized the city council to make only such ordinances, rules, police regulations, and by-laws as are *not contrary to the laws of that State*. The Supreme Court said: "The revised statutes simply prohibited the sale of spirituous liquors on Sundays to any but lodgers and lawful travelers. It might possibly have been competent for the common council under their general power to make police regulations to extend the prohibition so as to make it total on that day. *At any rate, there would not have been a direct conflict*. But the revised statutes in this particular are not simply prohibitory, they are also expressly permissive. They authorize the vendition on Sunday to certain lodgers and travelers. It needs no reasoning to show that two provisions, the one permitting, and the other prohibiting, the same act are in direct conflict with each other." *Wood v. The City of Brooklyn*, 14 Barb. 426. So, in the action at bar, the legislature has simply prohibited the sale of opium, and certain other poisons, unless a certain record is kept. It has not directly authorized the sale of opium without the prescription of a physician; it has not legislated upon that subject at all, except in providing that where a physician's prescription is presented no other record need be kept. The city has gone further than the statute, and provided that no opium shall be sold without a prescription. While the regulation is different from that of the State where is no *conflict*, and, therefore, it is not in violation of the provision of the constitution quoted above.

There are the very best of reasons why cities should be authorized to impose penalties in addition to those inflicted by the laws of the State. "Particular acts may be far more injurious, while the temptation to commit them may be much greater in a crowded city than in the State generally. They consequently require more severe measures for prevention. State laws are, of course, for the general good, and cannot always answer the peculiar wants of particular localities." *Wood v. City of Brooklyn*, 14 Barb. 426. See also *City v. Kellar*, 18 Ia. 66; *In re Sic*, 73 Cal. 151; *Ex parte Cheney*, 90 Cal. 620.

The offenses being different there is no violation of the constitutional inhibition against putting one twice in jeopardy for the same offense. *McInerney v. City of Denver*, 29 Pac. Rep. (Colo.) 518. . . .

The petitioner is remanded to the custody of the chief of police.

3. *Taxation*

UNITED STATES v. NEW ORLEANS *

98 U. S. 381. 1878

ERROR to the Circuit Court for the District of Louisiana.

Petition presented by Ranger for a writ of *mandamus* to compel the city to pay three judgments which he has recovered against it on certain bonds and coupons. Allegations show that the bonds were issued by the city under two acts of the legislature, passed in 1854, which authorized it to subscribe to the stock of certain railroad companies and issue its bonds in payment therefor, but provided that the stock "should remain forever pledged for the payment of the bonds." The stock has been sold by the city. Relator prays that the respondents be compelled to apply the proceeds from the sale to the payment of his judgments, or to levy a tax for that purpose. The answer avers that the proceeds of the stock have been expended by the city for other purposes; and that no tax for the payment of the principal of the bonds is directed to be levied by the acts under which the bonds were issued, or by any other act of the legislature. The relator demurred to this answer. The court overruled the demurrer and refused the writ.

The charter of the city empowered it to raise money by taxation "to supply any deficiency for the lighting, cleansing, paving, and watering the streets of said city; for supporting the city watch, the levee of the river, the prisons, workhouses, and other public buildings, and for such other purposes as the police and good government of the said city may require," and declared that the city "shall be vested with all the powers, rights, privileges, and immunities incident to a municipal corporation, and necessary for the proper government of the same."

Mr. D. C. Labatt, for the plaintiff in error.

Mr. B. F. Jonas and *Mr. Henry C. Miller*, for the defendants in error.

MR. JUSTICE FIELD. The judge of the circuit court accompanied the judgment with an opinion giving the reasons for his decision, which were substantially those stated in the answer of the city: that the statute authorizing the issue of the bonds, upon which the judgments were recovered, made no provision for levying a tax to pay the principal, but intended that it should be paid out of the stock of the railroad company and its revenues; and that the proceeds from the sale of the stock had been already expended by the predecessors of the present city authorities. The court, adopting the view of the city authorities as to the construction of the statute, and the supposed intention of the legislature, proceeded on the principle that the power of taxation belongs exclusively to the legislative branch of the government, and that the judiciary cannot direct a tax to be levied when none is authorized by the legislature;

and that the issuing of a *mandamus* to apply the proceeds received from the sale of the stock would be a futile proceeding, they having been previously used for other purposes. A writ, said the court, could not issue commanding the performance of an admitted impossibility.

The position that the power of taxation belongs exclusively to the legislative branch of the government, no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the State for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of those purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of peace, good order, and health, and the execution of such measures as conduce to the general good of its citizens; such as the opening and repairing of streets, the construction of sidewalks, sewers, and drains, the introduction of water, and the establishment of a fire and police department. In a city like New Orleans, situated on a navigable stream, or on a harbor of a lake or sea, their powers are usually enlarged, so as to embrace the building of wharves and docks or levees for the benefit of commerce, and they may extend also to the construction of roads leading to it, or the contributing of aid towards their construction. The number and variety of works which may be authorized, having a general regard to the welfare of the city or of its people, are mere matters of legislative discretion. All of them require for their execution considerable expenditures of money. Their authorization without providing the means for such expenditures would be an idle and futile proceeding. Their authorization, therefore, implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.

For the same reason, when authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess — so seldom, indeed, as to be exceptional — any means to discharge their pecuniary obligations except by taxation. "It is therefore to be inferred," as observed by this court in *Loan Association v. Topeka* (20 Wall. 660), "that when the legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to

pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

The doctrine here stated is asserted by the Supreme Court of Pennsylvania in *Commonwealth v. Commissioners of Allegheny County*, 37 Pa. 277. . . .

In numerous cases, similar language is found in opinions of the State courts, not required, perhaps, to decide the point in judgment therein, but showing a recognition of the doctrine stated. Thus, in *Lowell v. Boston* (111 Mass. 460), the Supreme Court of Massachusetts, in speaking of bonds which the legislature had authorized the city of Boston to issue, in order to raise funds to be loaned to individuals to aid them in rebuilding that portion of the city which was burned in the great fire of November, 1872, said: "The issue of bonds by the city, whatever provision may be made for their redemption, involves the possible and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized." To the same purport is the language of the Supreme Court of Wisconsin, in *Hasbrouck v. Milwaukee*, 25 Wis. 122. And in the recent case of *Parsons v. The City of Charleston*, in the United States Circuit Court, the Chief Justice gave emphatic affirmation to the doctrine. Hughes, 282. Indeed, it is always to be assumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure. When, therefore, a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant of the former, and such implication cannot be overcome except by express words excluding it.

In the present case, the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgments restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed.

If the question were an open one, our conclusion would be the same. The act of 1854 provided that the railroad company should issue to the city certificates of stock for an amount equal to the amount of bonds received; and that the stock should remain "for ever pledged for the

redemption of said bonds." It is plain that this language was intended only to create a statutory pledge by way of collateral security for the payment of the bonds. . . .

There is nothing, therefore, in the positions of counsel to impair the validity of the bonds upon which the judgments were recovered, if we were at liberty to consider them on this application. But, as already said, the judgments are conclusive upon this point. Owing the debt, the city has the power to levy a tax for its payment. By its charter, in force when the bonds were issued, it was invested, in express terms, "with all the powers, rights, privileges, and immunities incident to a municipal corporation and necessary for the proper government of the same."

As already said, the power of taxation is a power incident to such corporation, and may be exercised for all the purposes authorized by its charter or subsequent legislation. Whatever the legislature empowers the corporation to do is presumably for its benefit, and may, in "the proper government of the same," be done. Having the power to levy a tax for the payment of the judgments of the relator, it was the duty of the city, through its authorities, to exercise the power. The payment was not a matter resting in its pleasure, but a duty which it owed to the creditor. Having neglected this duty, the case was one in which a *mandamus* should have been issued to enforce its performance. *Knox County v. Aspinwall*, 24 How. 376; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Benbow v. Iowa City*, 7 *id.* 313; *Supervisors v. Rogers*, *id.* 175; *The Supervisors v. Durant*, 9 *id.* 415; *County of Cass v. Johnston*, 95 U. S. 360.

The judgment of the court below must, therefore, be reversed, and the cause remanded with directions to issue the writ as prayed in the petition of the relator; and it is

So ordered.

STATE v. SMITH

31 Iowa, 493. 1871

ACTION brought originally before a justice of the peace, to recover a penalty for the violation of an ordinance of the city of Dubuque. Judgment was rendered for plaintiff, which, upon appeal to the Circuit Court, was affirmed. Defendants appeal to this court.

S. M. Pollock for the appellants.

E. McCeney for the appellee.

BECK, J. An ordinance of the city of Dubuque, passed July 14, 1870, contains the following provisions: . . .

"Sec. 2. That no person shall, within the limits of said city, act as

the agent of any insurance company, or solicit insurance for any such company unless duly authorized so to do by a city license issued for that purpose; and any person who shall violate the provisions of this section shall forfeit and pay to the city the sum of not less than \$10 nor more than \$100.

"Sec. 3. Whenever any person shall make application to the city recorder for a license to act as the agent for any insurance company, and shall deliver to him a receipt of the treasurer for the sum of \$10, paid for that purpose, said recorder shall issue a license in the usual manner, authorizing the carrying on of such business within the city, and shall state therein the company for which he may act; provided, that when any one person represents more than one company, he shall pay said sum and procure a license for each of said companies, and each license shall be separate, and shall contain only the name of the company to which it is intended to apply." . . .

The defendants contend that the proceeding and judgment against them are authorized by law, because the city, under its charter, has no authority to enact the ordinance in question. This is the only point presented in the case which we find it necessary to determine.

It is not and cannot be claimed that the power to impose the tax in question is necessary to carry into effect some other power expressly delegated to the city by its charter. We must look to the charter, then, for some express grant of the authority which the city under the ordinance seeks to exercise, for it is a well-settled doctrine that a municipal corporation can exercise no power of taxation unless it be expressly conferred by the legislature, or be absolutely necessary in order to carry out some other power expressly conferred. *Clark, Dodge & Co. v. The City of Davenport*, 14 Ia. 494; *The City of Davenport v. The M. & M. R. Co.*, 12 *id.* 539; *Minturn v. Larue*, 23 How. 435; *Beaty v. Knowles' Lessee*, 4 Pet. 152.

It is insisted by plaintiff that the power in question is delegated to the city in express terms by paragraph 18, section 7, of its charter, being chapter 210 of the acts of the Sixth General Assembly. This provision is relied upon as a grant of the power which is sought to be exercised under the ordinance above set out. The city is therein authorized, "To license, tax, and regulate auctioneers, peddlers, and traveling merchants, grocers, merchants, retailers, hotel-keepers, and keepers of livery stables, of eating-houses, of boarding-houses, saloons, and places of amusement, and bankers, dealers in money, warrants, notes, and other evidences of indebtedness, and *works of all kinds*." The power, it is claimed, is conferred by the last four words of the paragraph just quoted, taken in connection with the context. The city is thereby authorized to "license and tax . . . works of all kinds," or to "license and tax . . . dealers . . . in works of all kinds." . . .

We do not entertain a doubt that the words of the charter were *not* intended to describe the business of insurance agents.

At all events, no one will claim that the language can be applied to that class of persons without a doubt, and, if used in that sense, that it is free from ambiguity. This court has held that, in construing such legislative grants of power, "any doubt or ambiguity arising out of terms used by the legislature must be resolved in favor of the public." *Clark, Dodge & Co. v. The City of Davenport*, 14 Ia. 494, 500. Applying this rule to the case we would be compelled to hold against the existence of the power in the city to enact and enforce the ordinance in question.

Reversed.

Plaintiff's position must be reversed.

HAM v. MILLER *

20 Iowa, 450. 1866

PLAINTIFF sues to remove an incumbrance on his title to land. The land was sold, under city ordinances which authorized such proceeding, for non-payment of taxes assessed to plaintiff; and a deed was given by the city to defendant, the purchaser. Plaintiff's position was that the city had no power to sell property for delinquent taxes. Plaintiff prevailed and defendant appeals.

WRIGHT, J. . . . We are, therefore, brought back to the first inquiry, whether, under the charter of the city of Dubuque, there is any power to sell and convey real estate for the non-payment of taxes, and we have no hesitation in holding that the power is not conferred.

We need not say that this power, sovereign in its nature, must not depend for its existence upon mere inference, but must always be created by express grant. Blackw., 10-30, and authorities there cited. To create or confer the power is one thing, and to regulate its exercise is quite another.

The Act of March 22, 1858, specifies the purchaser's rights and the mode of making the sale effective, or foreclosing the redemption, in cases where the real estate is sold by virtue of the laws and ordinances of the corporation. In most of the city charters the power to thus sell and convey is given in express words. To all such this act would apply; but not to a corporation, like that of Dubuque, possessing no such power.

The only provisions of the charter under which the power could by possibility be claimed, are clauses 23 and 24 of sec. 7, city charter, 1858; approved January 28, 1857. These provide that the city council shall have power to collect taxes to defray the current expenditures, and pay the debts of the city, and to provide for the assessment of all taxable property in said city, with reference to taxation for city purposes. There is not even a provision giving the power to pass ordi-

nances to carry into effect the granted powers. This power would be presumed, perhaps, without the aid of an express grant. But the power to "provide for the assessment of all taxable property," or "to collect taxes," does not include that of selling and conveying in case of non-payment. This power, so high, delicate, and important in its nature and character, must not rest upon an implication so remote — nor depend for the mode and manner of its exercise upon the mere will or discretion of the city council. And especially is this so where the charter, as in this instance, fails to leave this or any kindred matter to such discretion or will.

Affirmed.

WHITING *et als.* v. TOWN OF WEST POINT

88 Va. 905. 1892

PETITION for a *mandamus* by C. T. Whiting and others, "taxpayers of the town of West Point," to compel the town council to assess for taxation the property of the West Point Terminal Railway and Warehouse Company. On the 10th of June, 1882, an ordinance was passed exempting the property of the company so long as it should keep its principal office in Virginia within the corporate limits of the town. This ordinance was, on the 2d of June, 1890, repealed, but was afterwards "revived and re-enacted" by an ordinance passed on 1st of September, 1890. The principal ground upon which the writ was prayed for was that the exemption was unauthorized and void. Other facts are stated in the opinion.

H. R. Pollard and Isaac Diggs, for petitioners.

W. W. Gordon, for respondents.

LEWIS, P., delivered the opinion of the court.

The real question in the case is whether a municipal corporation has the inherent power to exempt from taxation any property which by its charter it is authorized to tax. The town of West Point, by the fourteenth section of its charter, is authorized to tax "all the real and personal property" in the town; and by the following section it is made the duty of the town council annually to appoint an assessor, whose duty it is to assess "all personal property and all improvements put upon real estate" in the town since the last preceding assessment. Nothing is said in the charter about making exemptions. Has the corporation, then, the power to make them? We think it clear both upon principle and authority, that it has not.

A municipal corporation has no element of sovereignty. It is a mere local agency of the State, having no other powers than such as

are clearly and unmistakably granted by the lawmaking power. A doubtful corporate power, it has been said, does not exist; and when any power is granted, and the mode of its exercise is prescribed, that mode must be strictly pursued. *Minturn v. Larue*, 23 How. 435; *Roper v. McWhorter*, 77 Va. 214; *Green v. Ward*, 82 *id.* 324; *City of Richmond v. Daniel*, 14 Gratt. 385; 1 *Dill., Mun. Corp.* (4th ed.) § 91.

Now, the power of taxation is not only an attribute of sovereignty, but it is essential to the existence of government; and as all are protected by the government, so all should contribute to its support. "However absolute the right of any individual may be," says Chief-Justice Marshall, "it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature." *Providence Bank v. Billings*, 4 Pet. 514. Nor, strictly speaking, is this power of the legislature transferable; for, as we shall presently see, whenever taxes are imposed, whether by a municipality or the State, it is, in legal contemplation, the act of the State, acting either by her own officers or other agents designated for the purpose.

So, also, is the power to make exemptions sovereign in its nature, and likewise resides in the legislature, unless the Constitution otherwise ordains.

It is, therefore, a legal solecism to say that the power of exemption, or any other sovereign power, is inherent in a municipal corporation, which, though invested with certain governmental powers for local purposes, is in no particular sovereign. . . .

A leading case, and one which closely resembles the present, is *State v. Hannibal & St. J. R. Co.*, 75 Mo. 209. In that case the city of Hannibal contracted with the railroad company to exempt its property from city taxation for and in consideration of the annual payment by the company of \$700. The contract recited that the company denied the right of the city to tax its property, and intended, if such alleged right was exercised, to remove its general office and machine-shops from the city to some other point; and it was this that led to the making of the contract. Several years after the date of the contract — the company having in the meantime fully complied with it — the property of the company was assessed for city taxes, and thus the question arose whether the contract was valid; and it was held that it was not. The court rested its decision upon the ground that the power to make exemptions was not conferred by the city's charter, and that the delegated power to tax was in the nature of a public trust, which could not be surrendered in whole or in part. No argument, it was said, was necessary to show that the same principle which forbids the absolute cession by a municipality of this power, likewise forbids that which approximates thereto, namely, the right to make exemptions. It was said, moreover, that the idea of taxation imports equality of apportionment; that it is this which distinguishes

taxation from arbitrary exaction, and that the exemption of the property of one person casts an inequitable burden on others not thus graciously favored.

The same principle was enforced in *Austin v. Gas Company*, 69 Tex. 180. In that case the city of Austin contracted with the defendant company to exempt its property from taxation in consideration of its furnishing gas to the city at a reduced rate. The contract, however, was held to be *ultra vires*. "The legislature," said the court, "never having attempted to confer upon the city the power to exempt any property which it was authorized to tax, the contract relied upon, in so far as it attempted to give the exemption claimed, must be held void."

In *Wilson v. Supervisors*, 47 Cal. 91, an order remitting taxes, though made pursuant to a legislative act, was held void, on the ground that it was repugnant to the Constitution of California, which provides that "taxation shall be equal and uniform," and that "all property shall be taxed in proportion to its value."

These authorities, which are only a few of many that might be cited to the same effect, show that the rule requiring all municipal powers to be construed strictly, applies especially to a case like the present. And the reason, as already suggested, is this: that the power of taxation, being an attribute of sovereignty can be exercised only by the sovereign. Hence, when delegated by the legislature to a municipal corporation, the latter is considered, as *pro hac vice*, the agent of the State, acting for the benefit of the municipality. In other words, the municipality, in the eye of the law, is the hand of the State by which the tax is laid and collected. Therefore, the statutory authority must be strictly pursued; for as an agency to sell does not imply an agency to buy, so neither does a delegated power to tax imply a power to exempt. If this were not so, and if a municipal corporation could, at pleasure, exempt the property of one person, it could exempt the property of all, and thus deprive itself of the means of existence, or of accomplishing the objects for which it was created. . . .

Undoubtedly, unless forbidden by the fundamental law, the legislature of a State may for a consideration grant away the power of taxation, either for a specified period or permanently. Instances of this sort have frequently occurred in granting private charters; and it was, no doubt, to such cases that Judge Staples referred in *City of Richmond v. R. & D. R. R. Co.*, *supra*, when he said that the power of the legislature to surrender the power of taxation in specific cases, had been exhaustively discussed by the Supreme Court of the United States, and that the law on the subject was well settled. See *Home of the Friendless v. Rouse*, 8 Wall. 430, and cases cited.

But this is beside the present case, for here it is the power, not of the legislature, but of a municipal corporation, that is drawn in question.

We think the petitioners are entitled to the writ. To hold that a

municipal corporation in Virginia inherently possesses the important and responsible power contended for by the defendants, would be a dangerous doctrine. The circumstances of this very case are at least suggestive of the liability to abuse of such a power in such hands. It appears that of the seven members of the council when the ordinance restoring the exemption in question was passed, four were employees of the Terminal Company. The latter all voted for the ordinance, whilst those not so employed voted against it. The result was to relieve the company of a municipal tax on property assessed at \$710,480.15, thereby to that extent increasing the burdens to be borne by others. And whilst these remarks are not meant as a reflection upon the council, or any one else, yet the facts just mentioned ought to serve as a warning against establishing a doctrine in this State that has been wisely rejected elsewhere.

The judgment of the court is to award the writ as prayed for in the petition.

LACY, J., and RICHARDSON, J., *dissented*.

Mandamus awarded.

4. Power to Adjust Claims and Pay Money

Has *the city* taken notes? *to secure money*
CITY OF BUFFALO v. BETTINGER

76 N. Y. 393. 1879

CHURCH, C. J. The action is upon three promissory notes, made by one Geib, payable to the order of the defendant, and by him indorsed to one Bork, and by the latter delivered to the plaintiff. . . .

It is insisted that the plaintiff had no capacity, either to take, hold, or prosecute the notes in question. It is not claimed that there is any specific prohibition in the charter, or any statute, but it is sought to imply a prohibition from the limited purposes and objects of the corporation, and from the general statutory and common law rule, that "no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given."

We think that the principle invoked has no application to this case. Bork had been city treasurer, and was a defaulter to nearly half a million of dollars, and had left, or was about to leave, the country. He was a debtor to the city for that amount, for which, so far as appears, the city had no security, except the official bond, and whether that was adequate does not appear, nor is it material. These notes with some other securities were delivered to the city as security, or in payment upon this

indebtedness. We have no doubt but it was entirely competent for the city to receive and enforce such securities. The power is incident to the specific powers conferred. The charter expressly authorizes it to "take, purchase, hold, and convey, real and personal property as its purposes shall require." Ch. 519, Laws of 1870, § 1. And the Revised Statutes applicable to all corporations confers the same power, and also that it may "sue, and be sued." 2 R. S. 599. The corporation may not deal in notes and bills, nor would any officer be authorized to take notes for payment of taxes or other liabilities of persons which are imposed by law, and for the enforcement of which the law has prescribed a specific mode. But there are many ways in which liabilities may be incurred to the city, in respect to which it may deal, the same as an individual. Suppose its property should be injured or destroyed under circumstances creating a liability, or in the purchase of real or personal property, the title fails, or in any other manner its pecuniary interests are affected, the redress for which is not provided for, may it not bring an action, or settle, or compromise the claim, and take payment or security for the payment of such demands? I am of opinion that such a power is necessary to the exercise of the powers conferred. The facts of this case illustrate the necessity of this rule. The treasurer had become a defaulter for a very large amount, and a heavy loss was imminent. It was the right and duty of the city to institute any legal proceedings, which an individual might take, and receive any property which it could obtain by legal process or otherwise, to save itself from loss. Statute authority conferring this specific power is not necessary. It arises by necessary implication from the power of protecting its property and interests from spoliation and waste.

The learned counsel asks: "Can any officer or person connected with the city government, loan, advance, or use its money or funds upon notes, or in the purchase of, or discount of, bills of exchange, or other commercial paper?"

They cannot lawfully do these things, but if the officers have thus misappropriated the money of the city, they are liable both in a civil and criminal action, and the city may secure itself by legal process, or by voluntary arrangement, and take any property which an individual might. A municipal corporation has public and private attributes, and its rights and liabilities are regulated accordingly. *Potter on Corp'ns*, § 396; *Oliver v. City of Worcester*, 102 Mass. 489; *City of Detroit v. Corey*, 9 Mich. 155.

In protecting its property, in collecting its debts, and in general in transacting business of a private character, when not otherwise provided by statute, it may avail itself of all the rights and remedies afforded to an individual. We entertain no doubt but the city had ample power to take and hold the notes in question for the purpose for which they were taken, and to enforce them by action. The authorities sustain the exercise of more doubtful powers. *First Nat'l*

Bank of Charlotte v. Exchange Bank of Baltimore, 92 U. S. R. (Otto) 122; *Augusta v. Leadbetter*, 16 Me. 45; *Supervisors of Orleans Co. v. Bowen*, 4 Lans. 24. . . .

Judgment affirmed.

Can determine whether a liability on condemnation proceedings

PARET v. CITY OF BAYONNE • *heated*

37 N. J. L. (Sup. Ct.) 559. 1877. *provided by the*

ASSUMPSIT. Plaintiff's declaration alleges that, "the defendants, by their ordinance, entitled 'An ordinance to open, regulate, and grade First Street, between Avenue O and Ingham Avenue,' opened said street, and took certain lands of the plaintiff, of great value, to wit, of the value of \$6000, in said city, for the purpose of said street, and then and there went into possession, and devoted the same to public use, and still retain possession of the same, and thereby greatly impaired the value of certain adjoining lands and premises of the plaintiff, whereby the defendants became liable to pay to the plaintiff the amount of the value of said lands and of the said damages, to wit, the sum of \$6000, and, being so liable, then and there promised to pay to the plaintiff the said sum of \$6000 when they should be thereunto afterwards requested."

The action being at issue, was referred to arbitrators by agreement of parties. The referees have made their award. The plaintiff applies for judgment on the award and the defendant makes a counter application to set it aside.

For the plaintiff, *Collins & Corbin*.

For the defendant, *E. A. S. Man*.

DEPUE, J. . . . It will also be assumed that a municipal corporation has power to submit a controversy to arbitration, and that its attorney may consent to a reference for it, unless it be disabled therefrom expressly by some positive provision in its charter, or impliedly from the nature of the subject matter in controversy. *Dix v. Dummerston*, 19 Vt. 262; 1 *Dill., Mun. Corp.* § 398, n. . . .

The city, by its charter, was authorized to take lands by condemnation under the right of eminent domain. The mode prescribed for appraising the value of lands taken, and damages, was by a board of commissioners of assessments, to be appointed by the common council, whose duty it was, not only to appraise the value of the lands taken, but also to make the assessment of the cost of the improvements upon property benefited. *Laws*, 1869, p. 371. . . .

The charter of the city having provided a specific mode of ascertaining the value of the lands and damages, that method of ascertainment is exclusive. An assessment in the manner, and by the tribunal pre-

scribed, is the only foundation of a legal liability on the part of the city. 1 *Dill., Mun. Corp.* § 784; *City of Boston v. Shaw*, 1 Met. 130; *Reock v. Mayor of Newark*, 4 Vroom, 129.

Nor was it competent for the officers of the corporation to consent that an appraisement of damages should be made in a manner and by a proceeding different from that established by the charter. The officers of a corporation are agents, with only special powers such as are delegated to them by the act of incorporation, or such as are necessarily implied from the powers delegated. In making public improvements, at the expense and for the benefit of the owners of adjacent property, they are regarded as the agents of the individuals who, as owners of property benefited, may be called upon to contribute for the costs and expenses. *Bond v. Newark*, 4 C. E. Green, 376; *Schum v. Seymour*, 9 id. 143. In the performance of those functions they are required to conform strictly to the method of procedure prescribed. Nowhere have the principles on which these doctrines rest been more frequently enunciated, or strictly enforced, than by the courts of this State. [Citations omitted.]

The common council, not having the power to consent that the amount of the plaintiff's compensation should be determined in this manner, the consent of its attorney was a nullity.

The application to order judgment on the award is denied; but inasmuch as the suggestion of this course seems to have come from the defendants, no costs will be allowed.

BANCROFT *et al.* v. INHABITANTS OF LYNNFIELD

18 Pick. (Mass.) 566. 1836

ASSUMPSIT for services and disbursements. It appeared that Upton, a surveyor of highways of the town of Lynnfield, caused a ditch to be dug near one of the highways in his district, but whether this was done by him under a belief that it was a necessary improvement, or for the purpose of drawing on a suit to test the title to an open piece of ground through which the drain was conducted, was a question in controversy between the parties.

It also appeared, that an action was brought by one Abbott against Upton, averring his title to the land, and alleging the digging of such ditch to be a trespass; that at a meeting of the inhabitants of Lynnfield on April 1, 1833, it was voted to defend Upton against the action; that the plaintiffs, being chosen a committee by the town for that purpose, employed counsel and took the necessary measures for defending

the action; that the action was tried in June, 1833, and judgment was rendered therein for Abbott; that the damages, costs, and expenses of the defense were paid by the plaintiffs; and that at a meeting of the inhabitants of the town on the 17th of November, 1834, it was voted, that the bills of the plaintiffs for these disbursements should be paid by the town.

The defendants contended that the town had no authority to defend an action brought by an individual against Upton as a private individual, upon a question of controverted title, although the latter was at the time an officer of the town, and that the votes of the town in relation thereto were unauthorized and not binding; and that even if a town would be authorized in voting to defend a suit against a surveyor of highways, who, acting in good faith, had, in the exercise of such office, done an act which might be shown to be a trespass upon the soil of another, yet that the town had no such authority in the present case, because, as they alleged, the ditch was dug by Upton, not for the purpose of draining the road, nor in virtue of any duty or any power of his office, but solely to raise a legal question, whether the highway covered the place where the ditch was dug, and the act of digging it was a trespass; and the defendants offered evidence to prove these facts.

The plaintiffs objected to the admission of this evidence, on the ground that it established no legal defense, and that as the circumstances under which the drain in question was dug, were all fully known to the inhabitants before the votes in question were passed, they were precluded from now setting up this matter in defense, if it was otherwise available.

A *pro forma* opinion was thereupon expressed, that the town were bound by their votes, and that the evidence offered was inadmissible. The parties then consented to a default, subject to the opinion of the whole court.

Saltonstall and Choate, for the defendants.

Skillaber and Huntington, for the plaintiffs.

WILDE, J. . . . It may be that towns are not authorized to make any contract for the payment of money, which they are not authorized to raise money to discharge, by a tax on the inhabitants. This question, however, was left undecided in the case of *Stetson v. Kempton* [13 Mass. 272] nor is it necessary to decide it now, as we are of opinion that the town is authorized to raise money by a tax for the payment of these charges.

It is the duty of a town to repair all highways within its bounds, at the expense of the inhabitants, so that the same may be safe and convenient for travelers; and we think it has the power, as incident to this duty, to indemnify a surveyor or other agent against any charge or liability he may incur in the *bona fide* discharge of this duty, although it may turn out on investigation, that he mistook his legal rights and authority. The act by which the surveyor incurred a liability, was the

digging of a ditch, as a drain for the security of the highway; and if it was done for the purpose of raising a legal question as to the bounds of the highway, as the defendants offered to prove at the trial, the town had nevertheless a right to adopt the act, for they were interested in the subject, being bound to keep the highway in repair. They had, therefore, the right to determine whether they would defend the surveyor or not; and having determined that question, and appointed the plaintiffs a committee to carry on the defense, they cannot now be allowed to deny their liability, after the committee have paid the charges incurred under the authority of the town. The town had a right to act on the subject matter, which was within their jurisdiction, and their votes are binding and create a legal obligation, although they were under no previous obligation to indemnify the surveyor. That towns have an authority to defend and indemnify their agents, who may incur a liability, by an inadvertent error, or in the performance of their duties imposed on them by law, is fully maintained by the case of *Nelson v. Milford*, 7 Pick. 18. . . .

Motion to take off the default overruled.

GOVE *et als.* v. TOWN OF EPPING *

41 N. H. 539. 1860

ASSUMPSIT, submitted on an agreed statement of facts, substantially as follows: Plaintiffs, who were selectmen of the town, were prosecuted criminally for refusing to erase certain names from the list of voters of the town, when requested to do so at a meeting duly held for correcting the list. On one indictment a verdict was rendered for the defendant; the other was dismissed. Afterward, the town voted to pay the plaintiffs \$200 to indemnify them from the costs and damages sustained in defending against the prosecutions. This action is brought, after a demand, to recover the sum so voted.

Wilcox and Frink, for the plaintiffs.

Christie, for the defendants.

DOE, J. This action cannot be maintained. In correcting the check-list, the plaintiffs were acting, not as agents or servants of the town, under its direction and control, but in an official and judicial capacity; and no promise can be implied, on the part of the town, to indemnify them against the consequences of their action. *Wadsworth v. Henniker*, 35 N. H. 189.

The plaintiffs rely upon the express promise contained in the vote of the town. The power of towns to raise and appropriate money is

derived solely from statutory provisions, which restrict the power to certain specified objects, and other necessary charges. Votes to raise or to pay money for purposes other than those prescribed by statute, are void, and towns cannot be compelled, and, generally, will not be permitted, to carry such votes into effect. There is a broad distinction between giving an indemnity to officers of a town, or other persons, for losses sustained or liabilities incurred, in proceedings legally authorized by the town, or affecting the corporate interests of the town, and the bestowment of gratuities upon officers who have sustained losses or incurred liabilities, in the performance of official duties which do not concern the rights or obligations of the town, or upon other persons, who have met with misfortunes in their private affairs. It is not left to the unrestricted and irresponsible discretion of towns to vote gifts or to select donees; their charity is a duty defined, commanded, enforced, and regulated, and the objects of it are designated by law. A majority cannot dispose of the property of a minority in an unlimited manner. The fact that the person whom a town votes to indemnify holds a town office, or any other office, is not the test of the right of the town to indemnify him for any act. The question is, whether he was properly authorized by the town to do the act, or whether the act was any part of the business or duty of the town, or one in which the town, as a corporation, is so interested that it may ratify and adopt it. Thus a town may indemnify a surveyor of highways, for liabilities incurred in the *bona fide* discharge of his duties, because the town, being bound to repair highways, and being responsible for defects in them, has such an interest in the subject that it can adopt the acts of the surveyor, acting as the agent of, and for the benefit of the town, in a matter of town affairs. His duties are the duties of the town. *Bancroft v. Lynnfield*, 18 Pick. 566. Votes and contracts of towns are valid when they relate to objects concerning which they have a duty to perform, an interest to protect, or a right to defend. *Vincent v. Nantucket*, 12 Cush. 183. In the correction of the check-list, the town, in its corporate capacity, has no right, interest, or duty whatever. If the selectmen perform their duty in correcting it, the town gains nothing, and if the selectmen neglect their duty, the town is subject to no loss, penalty or liability.¹

Judgment for the defendants.

¹ See *Castner v. Minneapolis*, 92 Minn. 84.

LANCASTER COUNTY *v.* FULTON †

128 Pa. St. 48. 1889

MR. JUSTICE STERRETT. In his statement and affidavit of claim, plaintiff below avers that his demand is founded on a contract between himself and the county commissioners, dated June 28, 1882, by which he agreed to collect from the Commonwealth all overpaid taxes on personal property then due; for which services the county, by its commissioners, agreed to pay him twenty-five per centum on the amount or amounts which might be credited to it in its account with the Commonwealth; that said contract was evidenced by a resolution, adopted and entered on the minutes of said commissioners, as follows:

"Resolved, That H. R. Fulton, Esq., be and he is hereby appointed attorney for the county, to take proceedings to obtain credit for the county in its accounts with the Commonwealth for all unpaid taxes on personal property: Mr. Fulton's compensation is to be twenty-five per centum upon the amount or amounts which may be credited, and is to be in full settlement for all costs and expenses as well as of fees."

That, "in pursuance of said agreement and resolution the plaintiff, after five years of work, labor, and great expense, . . . procured a credit settlement in favor of the county . . . in its accounts with the Commonwealth, of \$20,823.50, of overpaid taxes included in the terms of said contract," etc.; and the plaintiff's compensation for services, etc., as specified in said agreement and resolution, is \$5,205.87, which sum is now due him with interest thereon from June 20, 1887.

In substance, the defense interposed by the county was, that at the time the resolution of June 28, 1882, was adopted, plaintiff below "was the duly elected and qualified solicitor" of the county, serving under the Act of February 18, 1870, at a salary of \$500 fixed by that act; and, for that reason, neither he nor the county commissioners had any power or authority to enter into the contract, under which the services were rendered, and on which the claim is founded.

It is conceded that when the contract was made and for a considerable time thereafter, plaintiff below was the duly elected and qualified solicitor of the county. The fourth section of the act under which he was elected, declares: "The salary of the officer, elected as hereinbefore provided, shall be five hundred dollars per annum, payable quarterly; and the officer so elected shall be the legal adviser of the board of commissioners of Lancaster County, and shall represent the said board in all proceedings in law or equity wherein the said county is a party or has any interest." He was undoubtedly a public officer within the meaning of the Constitution, article III, sec. 13, and article XIV, secs. 1 and 5, the first of which declares: "No law shall extend the term of

any public officer or increase or diminish his salary or emoluments, after his election or appointment."

The services for which the contract in question undertakes to provide are clearly within the sphere of the duties of the "solicitor, of Lancaster County," as defined by the Act of February 18, 1870. He "shall be the legal adviser of the board of commissioners of Lancaster County and shall represent the said board in all proceedings in law or equity wherein said county is a party or has any interest." What authority, then, had either the plaintiff below, or the county commissioners, to enter into a contract to compensate the former for services within the sphere of his duties as solicitor of the county? We are of opinion that they had none; that the act of the commissioners in undertaking to bind the county to pay the compensation provided for in the contract, was *ultra vires*. Doubtless the very object of the act in creating the office of county solicitor, providing for his election and fixing his salary, etc., was to take the power out of the hands of the county commissioners and place it beyond their reach. But be that as it may, we think the contract was *ultra vires* and void, and that the first and second points for charge submitted by defendant below, should have been affirmed. Those points are as follows:

"1. The contract of June 28, 1882, given in evidence by the plaintiff, having been made between the plaintiff and the commissioners of Lancaster County, when the plaintiff was a public officer, solicitor of Lancaster County, an office to which he was duly elected in pursuance of an act of assembly at a salary of five hundred dollars a year, is contrary to public policy and null and void, and no recovery can be had by the plaintiff for any services rendered by him in pursuance thereof."

"2. The said contract of June 28, 1882, given in evidence by the plaintiff, was contrary to public policy and void, and there can be no recovery by the plaintiff in this action for services rendered under and in pursuance of said contract, whether said services were rendered while the plaintiff held the office or solicitor of Lancaster County, or after the expiration of his term of office."

These points were answered together by the learned judge as follows: "I have probably fully answered these points in what I have said in the general charge: I may simply repeat what I have already said, that if the services of Mr. Fulton had been rendered while he was county solicitor, then there could have been no recovery; but, as the services were rendered largely after he was solicitor under his election, if the county commissioners recognized his services after that time, and he went on under their employment after his term of office expired, that would be a ratification by the commissioners of the agreement made by Mr. Fulton with them, and he would be entitled to recover whatever reasonable amount the jury may find due him for the services rendered and for the expenses incurred." . . .

In saying, as he correctly did, that if the services of plaintiff below "had been rendered while he was county solicitor, then there could be no recovery," the learned judge rightly assumed that the contract in question was unauthorized and illegal. All such contracts, whether intended to be so or not, are in effect evasive and subversive of law, contrary to public policy, and therefore void. They are no more capable of ratification than was the contract in *Hunter v. Nolf*, 71 Pa. 282. Speaking of the illegal contract under consideration in that case, Mr. Justice Sharswood said: "It is undisputed law that such a contract is illegal as against public policy, and cannot be enforced. Even if there had been an express contract on entirely different terms than those agreed upon before, it ought to be viewed with a considerable degree of suspicion as an attempt to evade a sound and salutary rule of public policy." . . .

Plaintiff's statement of claim avers, and his own testimony proves most conclusively, that all the services for which he claims to recover compensation were rendered under and in pursuance of the original illegal contract. . . .

There is no pretense that any new agreement was entered into, or the terms of the original in any manner changed after the expiration of his term of office. Neither the subject of a new contract nor the modification of the original ever appears to have been considered by the parties. The services of plaintiff below were no doubt efficient and valuable; but, so far as they were rendered during his term of office, his salary is all the compensation he can claim. As to services rendered after the expiration of his term of office, under and in pursuance of the original illegal and void contract, he cannot, under the pleadings and evidence in this case, recover. . . .

Judgment reversed.

MR. JUSTICE MITCHELL dissented.

5. *Power to Purchase Property*

LEWIS *et als.* v. CITY OF PROVIDENCE *et als.*†

10 R. I. 97. 1871

BRAYTON, C. J. The bill states that the complainants are taxpayers in the city of Providence, that the city council of said city have authorized the city treasurer to pay to Walter S. Burges and others the sum of \$11,000, whenever they shall present a deed satisfactory to the city solicitor, of certain lots on the plat of the Dorrance Street Association.

That the lots for which said sum is to be paid are not needed or proposed to be used, or purchased for any public or municipal use or purpose whatsoever, nor to meet, or as useful to, any public interest, for which said city may lawfully purchase real estate. That the plan of such purchase was formed and matured for the sole purpose of enabling the city and its officers to harass one of the complainants, Henry C. Clark, as an owner in the same Dorrance Street Wharf, and coerce him into an abandonment or compromise of his claims upon the city, established by a judgment against the city, and which action is now pending; that the purchase by the city is unlawfully made, and an unlawful expenditure by the city of public money; that the complainants are taxpayers and entitled to have such expenditures enjoined, and prays that the city and its officers and the said city treasurer may be enjoined from paying out any money under the resolution aforesaid of said city council.

To this bill the respondents have filed a general demurrer. . . .

The respondents say, that by the charter granted to the city, the city council are authorized to "purchase and take such real estate as they think useful to the public interests," and under this power they may rightfully purchase any real estate which they may choose to purchase. That it is made by the charter to rest in the discretion of the city council if they will purchase and what they will purchase, a discretion which cannot be controlled or overruled. That they have power to purchase without regard to its usefulness for any public interest, but for other purposes if they will.

It is not questioned, and certainly not denied by the respondents, that the powers granted to corporations and to municipal corporations are given for corporate purposes, to advance the purpose and object of the incorporation, and the powers given are to be exercised as they are intended, to subserve those purposes. The powers granted them are to be construed with regard to, and in subordination to, the object for which the corporation was created. *A. & A. on Corp.*, § 88. They may make contracts which are necessary and convenient to the exercise of their corporate powers, and their acts are valid when made relative to objects concerning which they have a duty to perform, an interest to protect, or a right to defend, but not when made for objects foreign to the purposes of their creation. The power to purchase being incident to every corporation, and unlimited in amount when not restrained by the charter, is nevertheless restrained, as its other powers are, to the purposes of its creation, and can only be exercised to effect those purposes for which they are given. It is not denied that corporations and their officers are to be regarded as trustees for the benefit of their members, and of the taxpayers especially of municipal corporations, and are to be held to exercise their trust in good faith; that the taxpayers are *cestuis que trustent*, and entitled to call for the due execution of the trust held for their benefit. . . .

The bill alleges that the proposed purchase is not to be made, nor the money to be paid, for any public or municipal use or purpose whatever. That the land is not intended to be used to meet, nor intended to meet, nor was it purchased as useful to, any public interest for which the city could lawfully purchase. It is admitted that there was no such purpose.

The bill alleges that the sole purpose of the purchase was to furnish means to harass one of the complainants, in order to compel him to abandon a claim already adjudged to him against the city, and other claims, or to compromise the same upon the respondent's terms. It is admitted that this was the sole purpose.

The bill in effect alleges, that the land was never deemed to be useful for any public interest for which the city might purchase to an unlimited amount, and the demurrer for the purposes of the present argument admits that it was not so deemed; and so the power is not proposed to be exercised with the intent to subserve the purposes of the incorporation, or the purposes contemplated by the terms of the grant of this power. This, we think, is not an exercise of the trust committed to the city council for the purposes for which it was intended.

We do not think the city council are to be controlled in the exercise of their discretion in purchasing what they may deem useful to the public interest, as to what they shall purchase, for what price, what particular public interest it is intended to subserve, or to what extent it will subserve that interest. It is only necessary that the purpose of the purchase and payment shall be to serve some public interest, and not for a purpose, and that a sole purpose, foreign to it.

It is not for us now to say of the complainants' case, that if the allegations of this bill are put in issue, they establish by proof that the city council have so far exceeded their power, and have disregarded all considerations of this kind, but by taking the state of things as admitted to be true, we must overrule the demurrer.

MR. JUSTICE POTTER said he wished to add to the reasons already given by the chief justice, some considerations growing out of the construction of Revised Statutes, chapter 30, relating to the powers of towns. The power given to towns to purchase real estate is given in the broadest language; yet no one ever contended that it could be used for purposes of mere profit or speculation, or for any other than one of the purposes for which towns were authorized to raise money. The two powers and all parts of the chapter were to be construed in connection. . . .

If the purchase was useful for any of the purposes for which they might lawfully purchase, this court would not inquire into the degree of usefulness or into the amount of price, unless a case was made out showing an abuse of the discretion.

The present decision settles nothing as to the facts of this case, nor anything farther than that the complainants are entitled to relief if

they make out such a case as they allege, i. e., that the land was not purchased for a public use.¹

An injunction was then granted.

CITY OF EUFAULA v. McNAB

67 Ala. 588. 1880

¹ SOMERVILLE, J. . . . The City Council of Eufaula, in the year 1872, purchased from the appellee, John McNab, thirty-four acres of land located within the corporate limits of the city, and a warranty deed was executed by McNab, conveying the same in fee simple to the city. The consideration paid was \$10,000 of the bonds of the city, running twenty years, and bearing interest from date, with coupons attached. This bill is filed to enforce the vendor's lien on the land for the accumulated interest, which amounts to about five thousand dollars, and also to fix the liability of the city of Eufaula for principal and interest of the bonds. The Chancellor made the decree prayed for, and ordered the sale of the lands for its payment, and the city of Eufaula appeals from this decree.

The question presented for our consideration is one of *ultra vires*, as to the corporate power of the city to make the purchase of this land for the particular purpose for which it is shown to have been bought.

It may be conceded, that, if the land in question had been purchased for an exclusively public use, as being designed for dedication to a purpose within the usual scope of municipal governments, it might be a proper exercise of corporate power under the above section, and the validity of the contract of purchase would not be affected, or rendered invalid, by any subsequent perversion of the land to unauthorized uses not shown satisfactorily to have been mutually intended at the time

¹ After this decision, the city council passed a resolution declaring that "it has become for the interest of the city, in its highway department and for other municipal uses," to purchase the property concerned, and authorizing its purchase. The property was accordingly bought and paid for by the city. Taxpayers then brought a bill to have the conveyance annulled and the price returned; alleging that the true purpose of the council in passing the resolution was to force Clark to abandon or settle his suits. The case was heard on bill, answers, and oral evidence; and the court granted the relief prayed for.

PORTER, J., said: "And power to compel the parties to repay the money and to restore the former condition of things is as essential as the power to enjoin an appropriation or payment of money, otherwise the corporation, by speedy action and payment, might anticipate and defeat the relief to which the complainants are entitled.

"And it is also well settled that the parties may resort to evidence *ab extra* to show the true object and intent of the municipal action.

"And from the answers and the oral evidence it is well established that the purchase was not for any of those purposes for which the city may lawfully purchase, but was primarily, if not solely, for the purpose of enabling the city to obtain a control of certain property, and to make use of it in settling a lawsuit with one of its citizens." *Place v. Providence*, 12 R. I. 1.

of the purchase. 2 *Dill., Mun. Corp.* § 444; *Weismer v. Village of Douglas*, 64 N. Y. 91, 21 Am. Rep. 586. But the terms of the charter are imperative, that such property must be "required for the use, convenience, and improvement of the city." Collateral advantages, incidentally resulting in the promotion of the city's commercial or business prosperity, will not be sufficient. It is not contemplated or permitted that such property shall be acquired in aid of any private enterprise not of a public character, however laudable may be its purpose, or however useful may be its encouragement. As said by Mr. Justice Miller, in *Loan Association v. Topeka*, 20 Wall. 655, 660: "It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it," . . .

It is useless to review in detail the evidence in this case as to the purpose for which this land was purchased. The scheme was manifestly inaugurated for the benefit of a private corporation, with the expectation, no doubt, of incidental advantages to the city of Eufaula, and with the belief, perhaps, that it would never necessitate municipal taxation for the debt created. The city ordinance of May 21, 1872, provided, "That his Honor, the Mayor, be authorized to have nine thousand, seven hundred dollars, twenty years' bonds, of the city of Eufaula, bearing eight per cent interest, payable annually on the 1st day of December, printed for the purpose of complying with the contract made with Mr. John McNab, for the land to be used by the South-East Alabama Agricultural and Mechanical Association." The evidence further shows that all the contracting parties fully understood that this land was really purchased by the city for the benefit of this agricultural association, as a suitable place for holding "their annual fairs," and that they had the "exclusive use of the premises." And the bonds, as printed and delivered to appellee, show on their face that they were given "for land embraced in the present Fair Grounds in said city;" a small difference of a few hundred dollars being paid in money.

We are of opinion that the city of Eufaula had no power to make this purchase for such a purpose. The city council, therefore, have no authority to levy taxes for the payment of the bonds, or the accumulated interest on them, and they impose no legal liability for their payment upon the municipality of Eufaula. *Loan Association v. Topeka*, 20 Wall. 655; *Allen v. Inhabitants of Jay*, 60 Me. 124; *Lowell v. City of Boston*, 111 Mass. 454; *Hanson v. Vernon*, 27 Ia. 28; *Railroad Co. v. Dunn*, 51 Ala. 128; *Weismer v. Village of Douglas*, 64 N. Y. 91. . . .

This view of the case compels a reversal of the Chancellor's decree, and the dismissal of the bill. Under the present frame of it, we do not think it can be retained as a bill for rescission and cancellation. . . .

SCHNEIDER v. CITY OF MENASHA *et als.*

118 Wis. 298. 1903

TAXPAYER'S ACTION to restrain defendant city and its officers from consummating a contract to purchase a tract of land just outside the corporate limits of the city, from which to obtain stone for manufacturing crushed rock for city purposes. The complaint contained all the necessary allegations to raise the question of whether the city possessed power to do the act sought to be prevented. The defendant city answered that the purpose of purchasing the land was to obtain a supply of crushed rock for use upon the city streets, and that such land was conveniently located for such purpose. A motion for a preliminary injunction was denied, and plaintiff appealed.

J. C. Kerwin, for the appellant.

For the respondents there was a brief by *Bouck & Hilton* and *J. M. Pleasants*, and oral argument by *Gabe Bouck*.

MARSHALL, J. . . . Can a city, under its general power to "purchase and hold real estate sufficient for the public use, convenience, or necessities" (Charter of Menasha, § 4, subch. XV., ch. 123, Laws of 1891), purchase real estate outside of its corporate limits convenient for use in obtaining a supply of crushed rock to be used upon the city streets?

The city of Menasha had express authority to improve its streets. It had express authority to purchase such real estate as it deemed reasonably necessary or convenient for the city's use. It possessed, by implication, all the powers reasonably necessary to the proper exercise of such express powers, and those essential to the objects and purpose of its corporate existence. *Trester v. Sheboygan*, 87 Wis. 496. The acquirement of a supply of crushed rock for use upon the city streets was a legitimate city purpose. That is conceded. It must be conceded, also, that to obtain such supply by the purchase of real estate and manufacturing the crushed rock therefrom within the city limits would be a legitimate exercise of corporate power. Would an act which does not involve the exercise of sovereign authority, — one in the exercise of the ordinary business functions of a city inside the city limits, — cease to be such if performed just over the boundary line or within a convenient distance from the city?

The language of the charter is general. Looking at the literal sense thereof, the city may do business outside its boundaries so far as reasonably necessary to carry out the express powers granted to it, as well as within. It is admitted that a city may own realty outside its limits for purposes which are essential to its welfare, as for a cemetery or pest house. On that, 2 *Dill., Mun. Corp.* (4th ed.) § 565, is cited. Judge Dillon, as we shall see later, some time after the text of his work was written, successfully maintained much broader authority for

cities. Counsel suggests that if the city can go outside its boundaries for a stone quarry because the corporation needs crushed rock for use upon its streets, it can go to any distance therefor, and that if it can go into the rock crushing business, it can also go into the business of building rock crushers. That argument, though plausible, lacks the merit of novelty, as will hereafter be seen. As an authority peculiarly in point, we are referred to *Duncan v. Lynchburg*, 34 S. E. 964, 48 L. R. A. 331, decided in the supreme court of appeals of Virginia. At first glance the case seems to strongly support counsel's side of the controversy, but upon a careful study thereof it appears that the powers of the charter of Lynchburg were much less liberal than those of the respondent city. Moreover, we find that the authorities cited do not support the extreme views of the Virginia court. The Lynchburg charter only authorized the purchase of property necessary for city purposes. The charter before us authorizes the purchase of property necessary or convenient for such purposes. The authorities cited by the Virginia court, in the main, bear on the question of exercising governmental powers outside the city. Those that touch on mere rights of ownership support a view rather contrary to the decision of the court. For example, *Riley v. Rochester*, 9 N. Y. 64, is referred to. The learned counsel here rely upon that and similar cases. The New York court expressly declined to hold that a city cannot take title to realty outside its limits for any purpose. It held that it cannot do so for the purpose of exercising governmental authority over the same. *Coldwater v. Tucker*, 36 Mich. 474, was cited by the Virginia court and is also relied upon here. That holds that a city may own public works outside its boundaries by implied authority under some circumstances.

The rule that a city cannot exercise its governmental authority outside its limits has nothing to do with the case in hand. This court held that it cannot exercise such authority in *Bocker v. La Crosse*, 99 Wis. 414. It at the same time recognized that a city may exercise its mere right to own and use property for legitimate city purposes outside its boundaries. That is very decisively maintained in the following cases, which seem to fully cover the case in hand, so far as decisions in another jurisdiction can do so; *People ex rel. Murphy v. Kelly*, 76 N. Y. 475; *Matter of Application of Mayor, etc.*, 99 N. Y. 569; *Lester v. Jackson*, 69 Miss. 887. In the second case cited Judge Dillon appeared for the city of New York and prevailed in the contention that the city possessed power to purchase land outside the city for a park. It was suggested to the court by the opposition, as an indication of the absurdity of that doctrine, that if land outside a city can be held for a park, it can acquire property regardless of distance; that if the city of New York can purchase land three miles from its limits, it can go to the Falls of Niagara or to the Adirondack Mountains, and can also build and operate a railroad to the premises acquired, and when its right in the matter is challenged, defend upon the plea of city purpose and implied

power to subserve the same. That argument was taken seriously by the court and considered, with the result, based upon reason and authority, that a general grant of power, as regards those matters which do not involve governmental functions, cannot be fenced about by corporate limits; that what constitutes a city purpose within such limits does not change merely by passing beyond the same. This language was used:

"The truth is that neither in authority, nor in the legislative practice, nor in the common sense of the question is there any basis for declaring that there can be no true and sound municipal purpose which reaches beyond the corporate lines."

The undoubted right to purchase a water supply outside the city was suggested, and the instance was pointed to of New York going for such purpose to a distance of forty miles from the city and expending millions of dollars in that regard. After disposing of the primary question of whether all city purposes end at the corporate limits going outward, and commence at such limits coming inward, the court took up the idea of distance suggested by the illustration given by counsel, and held that power in that regard is limited by the very nature of it; that so long as, considering the end in view, the range of reasonable convenience and adaptation to the exercise of the express power is not overstepped, municipal authority is not exceeded; that when an extreme action shall have been taken, so as to impress the impartial mind of some ulterior purpose, it is time to pause if not to turn backward. That doctrine was indorsed in *Lester v. City of Jackson*, *supra*, which was another case of buying land beyond the city limits for a park. The language of the court, in substance, was this: A municipal corporation may take and hold land convenient and accessible for a park, although it lies outside the corporate limits, and the charter confers no express authority to own land outside; the city cannot exercise its sovereignty over it, but it can exercise all the rights and powers pertaining to ownership.

It would not be profitable to examine at length the numerous cases called to our attention by appellant's counsel to support his view. It seems sufficient to say that, in the main, they hold that municipal authority in a governmental sense cannot be exercised outside the limits of the municipality. That is in harmony with the decision of this court, as we have seen. It is also in harmony with the view that municipal ownership may reach beyond corporate limits, as held in the cases to which we have referred. When one draws the distinction between mere right to own property for city purposes and the right to exercise sovereign authority over property, the authorities upon which this case was grounded are easily seen not to warrant the result sought.

In testing the question of whether a municipality has exceeded its corporate authority in going outside its boundaries in any given case we must first determine the purpose in view. If that be found to be

the exercise of police authority, or authority to govern in any sense, the conclusion must be that the end does not justify the act. If it be found to be the mere exercise of a business function, the conclusion must be that the mere act of going beyond the boundary does not necessarily involve excess of power. In determining whether corporate authority has been exceeded by reason of the distance from the city limits to which the act in question reaches, we must solve that by an appeal to reason and common sense, keeping in mind that municipal corporations, in their business matters, are governed by very much the same rules as private corporations. *Washburn Co. v. Thompson*, 99 Wis. 585. It comes down in each case to the exercise of mere human judgment. That being the case, there must necessarily be a wide range within which municipal officers, acting in good faith, may go, and not be guilty of such an abuse of power as to render their acts, as acts of the city, void. As suggested in the New York case, they may go to the point where to go further would indicate some ulterior motive, — indicate that a legitimate city purpose was no longer in view. That would be true whether the act done were performed within or without the corporate limits. Manifestly, in purchasing real estate for the convenience of a city, the element of convenience will enter into the matter, whether the purchase be made on one side or the other of the boundary line of the corporation. If the agents of the city should go so far from its boundary to obtain land for its use that the element of convenience would be no longer apparent, there would undoubtedly be such an abuse of authority as to render the act void. There is nothing of the kind in this case. It is not questioned, as we understand it, that municipal authority was not exceeded if power existed to purchase land for the purpose of obtaining a supply of crushed rock for use upon the city streets, beyond the city limits, at all. It follows, therefore, that the order appealed from must be affirmed.

Order affirmed.

6. *Power to Employ Property for Revenue*

BATES v. BASSETT *

60 Vt. 530. 1888.

REPLEVIN for one cow, etc. Plea that the property was taken by defendant, as collector of taxes on a rate bill and warrant. Judgment for the defendant.

It appeared that the town of Barre owned an old town hall in the second story of a building, the lower story of which was owned by an-

A city can't as lessor lease R 2 owned by it held for publ
purposes when the making of such lease is inconsistent with those
purposes. e.g. lease for long term putting it out of city's power to use
for the publ. purpose. Corpus Christi & Wharf Co 8 Tex Civ App 94

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other party; that in the winter of 1885, from the accumulation of snow on the roof, the town hall building was crushed in, completely destroying the walls of that part of the second story belonging to the town. The town voted to build a new town hall; and to authorize the selectmen to repair the old hall by putting up walls dividing it into several rooms, and to rent the rooms. The votes were carried out.

The court found: That the old town hall was not and is not needed or used for any purposes of the town, and that the same was not necessary or incidental to any use of the town; that the said old town hall was refitted and repaired by the said town of Barre at an expense of over \$2,500, for the purpose of renting the same; that the same apartments are now rented to various parties for a term of years by written leases and the town of Barre receives and takes the rent for the same. "We find that it would have been as profitable for the town in the end to have sold their interest in the old town hall instead of repairing and renting it."

In regard to the new town hall the court found that the building could have been built for all the suitable and reasonable uses of the town without being built in the manner and with the purposes set forth. "It is at the present time a profitable investment; we cannot find whether it will so continue or not. We think a town hall suitable and proper for the town could have been built without building any part or portion of it for rental purposes, and as profitable for the town; that the money expended in repairing the old town hall, together with the building of the new town hall and the fitting up of the same with scenery and heating apparatus, both together went in to make up a portion of the indebtedness of said town of Barre for the payment of which a tax was levied against the plaintiff and his property distrained, and was included in the tax so assessed against the plaintiff." The court also found, among other things, that the facts in the following statement, signed by the defendant, were true: That said building so erected by said committee is built of solid brick walls, is two stories high, with basement underneath the whole of said building; that said basement is divided into five apartments or rooms. In one of them is the apparatus for heating the whole building, and the other four are rented to several parties for a term of years. And none of them are required or used by the town. And while one of them might be used as a storage room for the road machine, pile driver, and other town property, it is found that the same can be housed elsewhere at one-fourth of the rental value of one of said rooms. That the first story of said building was divided into four apartments or rooms. The first is used as a post office, and a small room finished off in the rear of said office is occupied by the town and village clerk and treasurer, and contains the safe and records of the town; and said room is small, not over twenty feet square, and of little value with the rental of said town, and the fair rental of the town will not exceed \$50 per year.

But it may lease for purposes not inconsistent with
but germane to usefulness of those purposes for which it is held
for Hotel or city park or prop. Stanley v. Stone (1904), 144 F. 659. Alameda Co

The annual rental of the first story and basement is about \$1,300. The second story of the building is finished off for a town hall, or, as it is generally known, the "Opera Hall." The hall was built and finished off for a town hall and an "opera hall." Several dressing rooms and closets were fitted for the accommodation of theatrical troops.

"It is agreed that the old site is centrally located and easily accessible, and that it could have been rebuilt and furnished at an expense to the town of not exceeding \$5,000, so that the same would have been as safe and as convenient to the voters of said town assembled in free-man's and town meeting for the transaction of the business of the town as is the new hall, but would not be as convenient, desirable, or valuable to rent for theatrical, operatic, or other purposes."

The new building cost over \$29,000. The selectmen purchased scenery for the stage in the hall at an expense of \$413.50, and the whole expense of fitting up the stage was \$850. The population of Barre is rapidly increasing. The town was obligated to a third party to keep the walls of the second story and the roof of the building in which the old hall was situated in good repair.

John G. Wing, for the plaintiff.

E. W. Bisbee and *S. C. Shurtleff*, for the defendant.

POWERS, J. . . . In this case the town was confronted with a calamity which compelled a choice between building a new town house or repairing the old one. It might lawfully do either. It elected to build a new one. The building of the new one was an object of a public character which made taxation for the purpose lawful. Having the power to impose taxation for the new building, the town in legal meeting is the only umpire to decide how much it will expend in such building. We do not say that the discretion of the majority of the voters is unlimited in respect to a proposed expenditure for a proper municipal purpose. Cases may be easily conceived where a majority might vote an excessive tax from a reckless disregard of all rules of prudence. But courts do not undertake to set up their own views of the propriety of municipal actions as the standard by which to try the action of a town in the exercise of a power lodged with it by the law, but leave the exercise of such power just where the legislature has left it, in the discretion of the voters, until it is seen that the discretion is abused by a willful perversion of the power to illegal ends or abuse of its exercise that demands restriction.

The town of Barre might well anticipate its prospective needs in providing itself with a new town hall. It was not tied down to the iron rule of absolute necessity in determining the kind or style of its town hall. But it might build fitly according to its ability and according to its manifest destiny. It might provide such conveniences and improvements as prudent people customarily employ in the day and generation in which it builds. If steam heating is thought superior to

the old-fashioned fireplace, if the introduction of water into the building conduces to health as well as cleanliness, both manifestly are proper furnishings to the new building. The fitting up of rooms for rent was an expense *incidental* to the building of the town hall. The town has no right as a primary purpose to erect buildings to rent, but if in erection of its hall for its proper municipal uses, it conceives that it will lighten its burdens to rent part of its building whereby an income is gained, no sound reason is suggested why it may not do so. The true distinction drawn in the authorities is this: If the primary object of a public expenditure is to subserve a public municipal purpose the expenditure is legal, notwithstanding it also involves as an incident an expense which standing alone would not be lawful. But if the primary object is not to subserve a public municipal purpose but to promote some private end, the expenditure is illegal, even though it may incidentally serve some public purpose. 'This is the test where good faith is exercised in making the expenditure. If a public purpose is set up as a mere pretext to conceal a private purpose, of course the expenditure is illegal and fraudulent. There is nothing in this case that invalidates the action of the town in building its new town hall. *Spaulding v. Lowell*, 23 Pick. 71.

Having elected to build, the town had on its hands an old building. In the exercise of what seemed to them to be a wise discretion, the voters decided to repair it for rental purposes. This is said to be illegal. It would be, if the primary object was to invest money in a building to rent. The town could not purchase a building for rental purposes solely. But here the town already owns a building purchased or erected for its proper municipal purposes. It no longer has use for it for municipal purposes. Must it sacrifice its property, or may it not do with it what a prudent man would do with such a building? Suppose in a few years its road machine is supplanted by some improved machine which it deems it is wise to purchase; could it not keep its old one in repair to rent advantageously to others? It is no answer to say that the town would in the long run be as well off to give away its old building. The question was one for the town to decide for itself and its decision made in good faith is final.

The numerous cases cited in the defendant's brief fully support the conclusions here reached.

Judgment affirmed.

§ 97 "In erecting or acquiring publ. bldgs for corp. purps a m.c. is not restricted to present necessities but may make provision for present & future necessities. It may let the bldg or a part of it be used incidentally for priv. purps for compen. provided the private use or lease does not interfere with the applic. of the bldg to the legit. public needs of the m.c."

7. *Power to Acquire Property Otherwise than by Purchase*TOWN OF NEW SHOREHAM v. BALL *et als.* †

14 R. I. 566. 1884

DURFEE, C. J. This is a petition for the new trial of an action of ejectment in which the plaintiff, the town of New Shoreham, recovered a verdict against the defendants, who are the petitioners. The new trial is asked because, as alleged, the court erred in certain rulings and instructions given at the trial, and in refusing certain rulings and instructions requested by the defendants.

The town in proof of title adduced evidence of possession for more than twenty years. It appeared, however, that the premises were not used for municipal purposes, but were part of a larger tract which was for the most of the time in the occupation of tenants of the town. The defendants contended that the town could not acquire title by possession for any other than municipal purposes, and requested the court so to charge, but the court refused so to charge, and they excepted. The cases cited in support of the exceptions do not go to the point that a town cannot acquire land by possession for other than municipal purposes, but only to the point that it is *ultra vires* for a town to purchase land for other than such purposes. We think this is quite a different proposition; for a town cannot purchase land without expending its moneys, and it has no right to expend its moneys, raised by taxation or otherwise for municipal purposes, for other purposes. The acquirement of land by possession does not involve an expenditure any more than does the acquirement of land by deed of gift or by devise; and it has been decided that a gift or devise of land to a town is good, even though the land be given or devised in general terms, and be accepted without any intent to use it directly for municipal purposes. *Inhabitants of Worcester v. Eaton*, 13 Mass. 371; *Sargent v. Cornish*, 54 N. H. 18; *Dill. on Mun. Corp.* § 437. Land so given, even when not wanted for municipal purposes, may be applied by sale or lease to the alleviation of municipal burdens. It is not necessary to suppose that the possession here, which was maintained under a claim of right, began otherwise than rightfully. Indeed, the cases hold that if land be acquired *ultra vires* by a corporation, the title passes, nevertheless, and cannot be collaterally impeached. *Chambers v. City of St. Louis*, 29 Mo. 543; *Barrow v. Nashville & Charlotte T. C.*, 9 Humph. 304; *Davis v. Old Colony Railroad*, 131 Mass. 258; *Jones v. Habersham*, 17 Otto, 174. We do not think the defendants are entitled to a new trial on the ground first assigned. . . .

Petition dismissed.

8. Power to Execute Trusts

A mc in the absence of statutory restrictions may take and hold under
 VIDAL *et als.* v. GIRARD'S EX'RS *et als.*† *and administer a trust for a charitable purpose germane to the corp's purpose*
 2 Howard (U. S.) 127. 1844 *use when the trust is*

APPEAL from the circuit court of the United States for the eastern district of Pennsylvania. The appellants, who were heirs at law and next of kin of Stephen Girard, filed their bill against his executors, and other heirs, to set aside so much of his will as devised and bequeathed the property therein mentioned to found and support a college. The devise in question was to the corporation of the city of Philadelphia — "the Mayor, Aldermen, and Citizens of Philadelphia" — in trust for the establishment and support of a college for poor orphan boys.

Jones and Webster, for the appellants.

Binney and Sergeant, *contra*.

STORY, J. . . . As to the first question, so far as it respects the capacity of the corporation to take the real and personal estate, independently of the trusts and uses connected therewith, there would not seem to be any reasonable ground for doubt. The Act of 32 and 34 Henry VIII, respecting wills, excepts corporations from taking by devise; but this provision has never been adopted into the laws of Pennsylvania or in force there. The Act of 11th of March, 1789, incorporating the city of Philadelphia, expressly provides that the corporation, thereby constituted by the name and style of the mayor, aldermen, and citizens of Philadelphia, shall have perpetual succession, "and they and their successors shall at all times forever be capable in law to have, purchase, take, receive, possess, and enjoy lands, tenements, and hereditaments, liberties, franchises, and jurisdictions, goods, chattels, and effects to them and their successors forever, or for any other or less estate," etc. . . .

Now, although it was in early times held that a corporation could not take and hold real or personal estate in trust upon the ground that there was a defect of one of the requisites to create a good trustee, namely, the want of confidence in the person; yet that doctrine has been long since exploded as unsound, and too artificial; and it is now held, that where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person may do. It is true that, if the trust be repugnant to, or inconsistent with, the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possess-

Such use may be germane to the trust is not specifically enumerated among the purposes of the mc of the trust which that it will promote them The promotion of education well do this

ing equity jurisdiction, to enforce and perfect the objects of the trust. . . .

But if the purposes of the trust be germane to the objects of the incorporation; if they relate to matters which will promote, and aid, and perfect those objects; if they tend (as the charter of the city of Philadelphia expresses it) "to the suppression of vice and immorality, to the advancement of the public health and order; and to the promotion of trade, industry, and happiness," where is the law to be found which prohibits the corporation from taking the devise upon such trusts, in a State where the statutes of mortmain do not exist (as they do not in Pennsylvania), the corporation itself having a legal capacity to take the estate as well by devise as otherwise? We know of no authorities which inculcate such a doctrine or prohibit the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and regulations and powers. If, for example, the testator by his present will had devised certain estate of the value of \$1,000,000, for the purpose of applying the income thereof to supplying the city of Philadelphia with good and wholesome water for the use of the citizens, from the River Schuylkill (an object which some thirty or forty years ago would have been thought of transcendent benefit), why, although not specifically enumerated among the objects of the charter, would not such a devise upon such a trust have been valid, and within the scope of the legitimate purposes of the corporation, and the corporation capable of executing it as trustees? We profess ourselves unable to perceive any sound objection to the validity of such a trust; and we know of no authority to sustain any objection to it. Yet, in substance, the trust would be as remote from the express provisions of the charter as are the objects (supposing them otherwise maintainable) now under our consideration. In short, it appears to us that any attempt to narrow down the powers given to the corporation so as to exclude it from taking property upon trusts for purposes confessedly charitable and beneficial to the city or the public, would be to introduce a doctrine inconsistent with sound principles, and defeat instead of promoting the true policy of the State. We think, then, that the charter of the city does invest the corporation with powers and rights to take property upon trust for charitable purposes, which are not otherwise obnoxious to legal animadversion; and, therefore, the objection that it is incompetent to take or administer a trust is unfounded in principle or authority, under the law of Pennsylvania. . . .

We are, then, led directly to the consideration of the question which has been so elaborately argued at the bar, as to the validity of the trusts for the erection of the college, according to the requirements and regulations of the will of the testator. That the trusts are of an eleemosynary nature, and charitable uses in a judicial sense, we entertain no doubt. Not only are charities for the maintenance and relief of the poor, sick, and impotent, charities in the sense of the common law, but also dona-

tions given for the establishment of colleges, schools, and seminaries of learning, and especially such as are for the education of orphans and poor scholars.¹ . . .

Decree affirmed.

So relief from - force of hospital

PHILLIPS *et al.* v. HARROW *et al.*†

93 Iowa, 92. 1894

ACTION in equity to set aside the probate of two paragraphs of the will of P. G. Ballingall, deceased, and to have them decreed to be void and of no effect.

ROBINSON, J. . . . The plaintiffs are heirs of the decedent. The defendants include the executors of the will, the Ottumwa Library Association, the city of Ottumwa, and two persons, one of whom it is supposed may be an heir of the decedent. The city and the two persons last designated do not appeal.

The will devises to the city of Ottumwa, subject to mortgages thereon and charges specified, the real estate described in the first part of paragraph 9 "in trust" for the purposes specified. The property so devised is to be managed and controlled by three trustees, to be selected by the city council. Among the purposes of the trust are the following: (1) To provide a sinking fund of twenty thousand dollars for the purpose of rebuiding [devised] property in case of fire and remodelling the [devised] hotel building "to suitably keep up with the times and the growth of the city;" (2) to provide a fund of six thousand dollars for the benefit of the public library then established in the city of Ottumwa; (3) to use a part of other funds for the further benefit of the Public Library Association; (4) to aid the poor and needy people of the city of Ottumwa who are dependent upon their own labor for a livelihood; (5) to aid religious societies of the city; (6) to accumulate a fund to build or aid in building and maintaining a foundling hospital. It is claimed that these purposes, excepting that with respect to the library, are not germane to the objects of the city, and that it has not the power necessary to take the property and execute the trust. It is said in section 55, 2 *Dill., Mun. Corp.*, that "it is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved

¹ Contrast *Chapin v. School District*, 35 N. H. at 456.

*what would be - see 96 x County approp money for use of a
particular town Oneida Co for town of Irono - Jackson & Hartwell & Grimes*

by the courts against the corporation, and the power is denied." In *City of Burlington v. Kellar*, 18 Ia. 65, it is said to be "a well settled rule that the authority conferred upon municipal corporations is to be strictly construed, and must be clearly pursued." This court has in several cases held that acts of municipal corporations were invalid because not expressly authorized by statute. *City of Burlington v. Dankwardt*, 73 Ia. 170, 34 N. W. Rep. 801; *City of Chariton v. Barber*, 54 Ia. 360, 6 N. W. Rep. 528; *Field v. City of Des Moines*, 39 Ia. 575. But it is said that the defendant has an implied power to take property and execute trusts as provided by the will. Cities and towns organized under the laws of this State have power to "sue or be sued; contract or be contracted with, acquire and hold property real and personal, . . . and have such other privileges as are incident to municipal corporations of like character or degree, not inconsistent with the laws of the State." Code, section 454. They also have the power to enact ordinances to promote the prosperity, improve the morals, order, comfort, and convenience of the corporation and of its inhabitants. Code, section 482. They may establish and maintain free public libraries, and may receive gifts, devises, and bequests for their benefit. Code, section 461. They may also provide for parks. Acts Twentieth General Assembly, chapter 151. Cities of the first class may establish and maintain infirmaries for the poor, and also distribute to the poor outdoor relief. Code, section 538. There is no provision for the maintenance of foundling hospitals. Yet that contemplated by the will is to be for the special purpose of relieving unfortunate females, and protecting and caring for their off-spring; and such persons, when requiring aid, may well be classed as of the poor.

Municipal corporations have no power to appropriate or otherwise use public money for the benefit of any institution, association, or object which is under ecclesiastical or sectarian management. Code, section 552. But, as we have seen, they may do what will tend to promote the prosperity, improve the morals, comfort, and convenience of their inhabitants. The money appropriated by the will for the religious societies is to be distributed among them without regard to sect, and without partiality, the test of distribution being that the recipients be religious societies professing to work for the good and well-being of mankind. It is scarcely necessary to say that the purposes of such societies are universally to improve the morals and promote the interests of mankind, and that the work they do is, as a rule, of a nature to accomplish these purposes. Such purposes are in entire harmony with the objects for which municipal corporations are created, and, while they may not use public money for purposes of that kind, yet it is not inconsistent with the laws of the State to use money or other property given by private individuals for such purposes, where it is not used to benefit one denomination to the harm of another, or to promote purely sectarian purposes.

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Whether Ottumwa was a city of the first class when the will took effect we are not advised, nor is the fact material in this case; for, even though it had not the power to establish infirmaries for the benefit of the poor, to establish and maintain them was recognized by the law as a proper municipal object, although the right to do so at the public cost was restricted to cities of the first class. It is not, therefore, inconsistent with law, but in harmony with it, for municipal corporations to use private funds, given for the purpose, to aid the poor.

The requirement of the will that the Ballingall House and the tenements connected therewith shall be kept perpetually and that a fund of twenty thousand dollars be provided to preserve the property and make such improvements in the hotel building as shall be demanded by the growth of the city and the times, is merely a means to preserve the property in a condition to yield a revenue, and thus secure the charitable objects sought to be accomplished by the will. That the name "Ballingall House" should be retained is not inconsistent with such objects, and imposes no burden on the trustee. The obligation to raise a fund of six thousand dollars for the benefit of a public library is germane to the objects of the city. It was said in *Jones v. Habersham*, 107 U. S. 188, 2 Sup. Ct. Rep. 336, that a "corporation may hold and execute a trust for charitable objects in accord with or tending to promote the purposes of its creation, although such as it might not by its charter or by general laws have authority itself to establish, or to spend its corporate funds for. A city, for instance, may take a devise in trust to maintain a college, an orphan school, or an asylum." In *Vidal v. Girard's Ex'rs*, 2 How. 189, it was said: "If the purposes of the trust be germane to the objects of the incorporation, if they relate to matters which will promote and perfect and aid those objects," and the corporation has the legal capacity to take the estate as well by devise as otherwise, the trust may be assumed and executed by the corporation, "even though the act of incorporation may have for its main object mere civil and municipal government and regulations and powers." See, also, *McDonogh's Ex'rs v. Murdoch*, 15 How. 367; *Attorney General v. Parker*, 126 Mass. 221; *Perrin v. Carey*, 25 How. 465; *Davis v. Inhabitants* (Mass.), 28 N. E. Rep. 165; 2 *Dill., Mun. Corp.* § 437 *et seq.* It is said that the Ottumwa Library Association is a private corporation, and hence that donations to it are not in the nature of public charities. It was organized as a private corporation, but not for pecuniary profit, and it has never been conducted for that purpose. Persons may become subscribers for a fixed time by paying a prescribed fee, and are then entitled to take books from the library without the payment of other fee, but non-subscribers are required to pay ten cents for each book they take away. In the use of books and periodicals in the library rooms, no distinction is made between subscribers and non-subscribers. Fines are imposed for the violation of rules and for damage done to books. But the money collected from these and all other sources is used to maintain the

library and to purchase books. The objects of the association are in all essential respects for public welfare, and are charitable. See *Quinn v. Shields*, 62 Ia. 135, 17 N. W. Rep. 437; 2 *Perry, Trusts*, § 687. We conclude that the purposes of the trust created by the will are charitable, that they are germane to the objects for which the city of Ottumwa was organized, and that it has power to accept the property devised to it by the will, and to execute the trust thereby created. . . .

*a mc may be the subject of private bounty when no stg in which the fact that the char't SARGENT v. TOWN OF CORNISH
able purpose has been one in which the test was not specifically able to raise
money by tax" does not make it in 54 N. H. 18. 1873 consist of the corp. purp's*

JACOB FOSS, by his will, gave to the town of Cornish the sum of \$1,000, for the purposes and on the conditions in said will expressed, as follows:

"I give and bequeath to the town of Cornish, N. H., my native place, for the purpose of perpetuating the 'United States flag,' that the stars and stripes of which may remind the inhabitants of their bounden duty to themselves and their fellow-citizens of the whole United States to so act in harmony with right and justice that no occasion will occur to disturb our peace and tranquility in all coming time, the sum of one thousand dollars, on condition that the same be accepted, and invested by the said town so as to yield an income of not less than six per centum per annum, which income shall be invested yearly in 'United States flags,' to be used within the said town on all proper occasions; and it is my wish that they shall be used often enough so that not more than two years' purchases shall be on hand at a time. If the said town does not accept of the above named legacy, or should fail to carry out fully the above condition, then I give and bequeath the said sum of one thousand dollars to my late sister Deborah's children, to be divided equally between them, or, if they are deceased, to their legal heirs."

The will was duly proved and allowed. The town voted to accept the legacy, and an officer was appointed to take charge of the fund and see to its application. The executor of said will paid to said officer the sum of \$940, being the amount due after deducting \$60 United States internal revenue tax. This fund was invested immediately by said officer at six per cent interest, which interest has been regularly received, being payable September 14 of each year. On July 1, 1868, said officer or trustee expended, of the income accruing up to that time, \$85.59 for flags, including flag-staffs and the necessary ropes and fixtures for operating the same, and the labor pertaining thereto, leaving a balance unexpended, at that time, of \$27.21. In 1869 said trustee expended

in the same way \$81.35 of the income. In 1870 said trustee expended \$28.50 for flag, and \$34.37 for pole, ropes, and putting up the same; 1871, for flag, \$28.80; 1871, for pole, ropes, and labor, \$28.10; 1872, paid for flag, \$34.25; 1871, paid for fixtures, putting up, and expense of getting, \$15.60; — and which flags have been placed in different parts of the town where likely to do the most good. The amount of interest received up to the commencement of the action was \$56.40 per year.

The action is *indebitatus assumpsit* on the general counts, and the plaintiffs are the persons who would be entitled to the fund if forfeited by the town's failure to perform the condition of the will.

The questions of law arising on the above case were reserved for the full bench.

Flanders, for the plaintiffs.

Cushing, for the defendants.

FOSTER, J. Municipal corporations may be the objects of public and private bounty. Legacies of personal property, directly to the corporation for benevolent or public purposes, are valid in law, in the absence of disabling or restraining statutes. *Dill., Mun. Corp.* § 436.

Towns in this State "may purchase and hold real and personal estate for the public uses of the inhabitants." Gen. Stats., ch. 34, § 3. Not only may municipal corporations take and hold property in their own right, by direct gift, conveyance, or devise, but such corporations, at least in this country, are capable, unless specially restrained, of taking property, real and personal, in trust, for purposes not foreign to their institution, and not incompatible with the objects of their organization. And equity will compel such corporations to execute any lawful trusts which may be reposed in them. *2 Kent's Com.* *279, *280; *Dill., Mun. Corp.* §§ 437 and 443, and cases cited in notes; *Perry on Trusts*, §§ 42, 43; *Vidal v. Girard's Executors*, 2 How. 127; *Perin v. Carey*, 24 How. 465; *Trustees v. Peaslee*, 15 N. H. 331; *Chapin v. School District*, 35 N. H. 445; *The Dublin Case*, 38 N. H. 459. [The court then quoted from the opinion in *Vidal v. Girard's Executors*.]

These remarks indicate the views of that eminent jurist [Judge Story] that the scope of the purposes of a municipal organization is exceedingly broad and comprehensive. It is manifest that a municipal or other corporation should not be permitted to take and execute trusts for objects "utterly *dehors* the purposes of the incorporation;" but we fail to recognize any reason why its capacity in this respect should be limited to objects technically denominated charities or pious uses, or to religious or educational purposes; or, indeed, why it should be circumscribed by any other limitations than such as should exclude inconsistent, incompatible, and improper objects.

It would seem to be impossible to prescribe in definite terms the almost innumerable objects of a liberal bounty, with which a town might be advantageously and happily endowed, directly or in trust. It would probably be agreed by all, that a town in this State may hold property

in trust for educational purposes. And what are they? Not merely the means of instruction in grammar, or mathematics, or the arts and sciences, but all that series of instruction and discipline which is intended to enlighten the understanding, correct the temper, purify the heart, elevate the affections, and to inculcate generous and patriotic sentiments, and to form the manners and habits of rising generations, and so fit them for usefulness in their future stations.

And the means of education are not solely books and printed rules and maxims, but representations and symbols and pageantry, it may be. And it may be questioned if the youth of the land do not derive more of instruction in the holy duty of patriotism and love of country from bonfires and illuminations and the display of the old flag of our Union, than from books on the science of government or political economy, or commentaries on the constitution.

Generous men endow our towns with funds for the maintenance of soldiers' monuments; and every "decoration day" we place flowers upon soldiers' graves; and suspended in the capitol are the flags of noble regiments — from their tattered folds drop eloquent eulogy for the dead, and lessons from their example for the instruction and emulation of the living; and we do not regard any of these things as foreign to the purposes of, nor inconsistent with, our State or municipal organization or policy.

The purpose declared by the testator was the perpetuation in his native town of the "United States flag," to "remind the inhabitants of their bounden duty, to themselves and their fellow-citizens of the whole United States, to so act in harmony with right and justice that no occasion will occur to disturb our peace and tranquility in all coming time."

This purpose is certainly patriotic and good. The intention of the testator seems to have been "to educate the rising generation of Cornish to patriotic impulses." The legal status of a charity is not determined by its practical results, which can seldom be foreseen, and "this court cannot say, judicially, that the means adopted by the testator are not adapted to effect his patriotic purpose."

Though not directly within the scope of the more appropriate duties and powers of towns, this bequest and trust, certainly, is not repugnant to the general object of such corporations, and with slight change of phraseology the language of Perley, C. J., in the *Dublin Case*, may well be applied to the present: "Towns in this State are to be regarded as a co-ordinate branch of the government, established to advance the general good of the people; and under our constitution no one can entertain a doubt that to maintain (and cherish love for the Union of the States) is an object quite consistent with the general purposes for which towns are created, and that towns have, at least, an indirect interest in promoting (patriotism) within their limits."

Our conclusion is, that the town of Cornish possesses legal capacity

to take and hold the testator's bounty in trust for the purposes declared by his will.

We are of the opinion that the case discloses a practical and substantial compliance, by the town, with the condition, upon the performance of which the vesting in them of the legacy depends.

Since the town, though capable of holding the fund for the purpose designated, has not the power of raising money by taxation for the purpose of executing the trust, it can only make the fund available by appropriating a portion of the income to expenses necessarily incidental to the use, and without which the legacy and the trust must fail.

The testator, knowing the law, and intending, of course, to make a valid bequest, must have also understood and intended (since he provided no additional fund for the purpose) that the government tax should be paid out of the fund, and that a portion of its income should be appropriated to the furnishing of the indispensable appurtenances and paraphernalia without which the flags could not be displayed. If the bequest here is a charity, or analogous thereto, it must receive that liberal construction which courts, whether of law or of equity, employ in such cases — *Snell's Equity*, 90; and perhaps, if it were necessary, in order to support the testator's design, the doctrine of *cy pres* might be put in requisition. At any rate, the will is to have a reasonable and not necessarily an exactly literal construction, to effectuate the manifest intention of the testator. . . .

Case discharged.

DRURY *et als.* v. INHABITANTS OF NATICK *et al.*†

10 *Allen (Mass.)*, 169. 1865

BILL in equity by trustees chosen by the town of Natick, under the provisions of the will of Mary Ann Morse, seeking instructions as to their duty.

The will devised real and personal estate to the town "for the purpose of founding and establishing" "for the use and benefit of all the inhabitants of said town," a free library, and, if the funds should prove sufficient, a free reading-room. The institution was to be controlled by trustees chosen by the town. The will contained the following clause:

"Seventh. Said town of Natick shall forever pay all the expenses of the care of said library and reading-room, including the librarian's salary, and shall keep said building and grounds in good repair and order, and shall also keep said building and library insured against loss or

damage by fire; and in case they shall be destroyed or damaged by fire, the money accruing from said insurance shall be appropriated for rebuilding, repairing, and re-establishing the same."

It appeared from the bill and answer that the will was admitted to probate in August, 1862, and on the 6th of April, 1863, the town of Natick voted to receive and accept the said bequest, and chose the plaintiffs as the five trustees to take care of the same, who accepted the trust; and on the 4th of April, 1864, the town reconsidered said vote, and voted to decline to receive said bequest, and chose a committee of three to relinquish and release all its right, title, and interest therein. The answer of the defendants averred, amongst other things, that the estate of the testatrix proved so small that it would not be beneficial to the town to accept the same, with the burdens imposed by the will. The defendants were the town of Natick and the heir at law of the testatrix.

The case was reserved by GRAY, J., upon the bill and answer, for the determination of the whole court.

J. G. Abbott & J. W. Bacon (*G. B. Perry* with them), for the plaintiffs.

H. W. Paine & T. H. Sweetser, for the defendants.

GRAY, J. . . . This gift to the town of Natick to establish a library for the use of all the inhabitants was therefore clearly a public charity.

The capacity of a city or town to take and hold devises and bequests for appropriate charitable uses is perfectly well settled. *Vidal v. Girard*, 2 How. 190; *Perin v. Carey*, 24 How. 505; *White v. South Parish in Braintree*, 13 Met. 506; *Nourse v. Merriam*, 8 Cush. 19; *Webb v. Neal*, 5 Allen, 575. Indeed, the statutes of the Commonwealth in terms authorize towns to hold real and personal estate "for the public use of the inhabitants," or "in trust for the support of schools and for the promotion of education within the limits of the town;" and "to receive, hold, and manage any devise, bequest, or donation, for the establishment, increase or maintenance, of a public library within the same." Gen. Stats., ch. 18, § 9; ch. 33, § 9.

The devise and bequest to the town of Natick vested in the town from the death of the testatrix, subject to be renounced by the town within a reasonable time and before manifesting an intention to accept it. *Townson v. Tickell*, 3 B. & Ald. 31; *Doe v. Smyth*, 9 D. & R. 136, s. c. 6 B. & C. 112. *Ex parte Fuller*, 2 Story R. 330. The town in April, 1863, at a meeting duly called for the purpose, voted to accept and receive this gift, and chose trustees to take charge of it according to the will. Upon such acceptance, the power to renounce the gift ceased, and the estate could not pass from the town without a conveyance in due form of law.

Besides, the gift being for a charitable purpose, and once accepted, could not afterwards be renounced or conveyed away, so as to defeat the charity. *American Academy v. Harvard College*, 12 Gray, 551; *Harvard College v. Society for Theological Education*, 3 Gray, 280; *At-*

torney General v. Christ's Hospital, 1 Russ. & Myl. 626, s. c. Tamlyn, 393; *Attorney General v. Caius College*, 2 Keen, 163.

The town could not by such acceptance bind itself to appropriate money to the support of the charity beyond the limit prescribed by the statute, which provides that towns may "appropriate money annually for the maintenance or increase of a public library a sum not exceeding fifty cents for each of its ratable polls in the year next preceding that in which such appropriation is made." Gen. Stats., ch. 33, § 9. It is unnecessary, for the decision in this case, to consider whether the town can, by accepting a charitable gift for such a purpose, bind itself in advance to appropriate money to its support, or whether the sum to be so voted must be determined by annual vote of the inhabitants from time to time. It is not to be presumed that the town will fail to carry out, to the extent of its legal powers, the wishes of its benefactress.

The provision in the will for the payment by the town forever of all expenses of this charity and of repairing and insuring the building and library, even if [not?] subject to the vote of the town from time to time, does not invalidate the gift, nor forfeit the estate upon non-compliance with this provision, nor enable the town to renounce the gift at pleasure, after having once accepted it. This provision is not in the form of a condition, but of a direction. If it were in the strictest form of a condition, then so far as it undertook to impose obligations upon the town for the future, which it could not by law assume, it would be repugnant to the grant and void. *Nourse v. Merriam*, 8 Cush. 11; *Attorney General v. Greenhill*, 33 Beav. 193; 2 Bl. Com. 156. . . .

CHAPTER IV

PUBLIC EASEMENTS

1. *How Established*

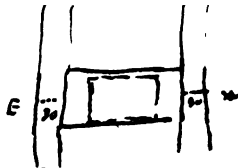
VANN, J., IN CITY OF COHOES v. DELAWARE,
ETC., CANAL CO.

134 N. Y. 397, at 402. 1892

PUBLIC highways may be created in four ways:

1. By proceedings under the statute. (2 R. S., 8th ed., p. 1372 *et seq.*; also p. 1383, § 100.)
2. By prescription, or where land is used by the public for a highway for twenty years, with the knowledge, but without the consent, of the owner. The presumption of a grant of the right of way springs from the mere lapse of said period of time in connection with the adverse user by the public.¹
3. By dedication through offer and implied acceptance, or where the owner throws open his land intending to dedicate it for a highway, and the public use it for such a length of time that they would be seriously inconvenienced by an interruption of the enjoyment. This rests upon the principle that the owner is estopped from revoking his offer after the public have acted on it for so long a period that it would be a fraud upon them if he were permitted to do so. No particular length of time is required to effect such a dedication, as every case of an estoppel *in pais* necessarily depends upon its own facts.
4. By dedication through offer and actual acceptance, or where the owner throws open his land and by acts or words invites acceptance of the same for a highway, and the public authorities, in charge of the subject, formally, or in terms accept it as a highway. In the absence of an actual conveyance the owner does not part with his title to the land, but only with the right to possession for the purpose of a highway.

¹ Some authorities deny that technical prescription can apply to support a public easement; for prescription involves the presumption of a grant, and the unorganized public is not capable of taking by grant. See *Angell on Highways* (3d ed.), § 131, and cases cited. But the weight of authority applies, under the term prescription, an analogous presumption, first stated by Shaw, C. J., in *Reed v. Northfield*, 13 Pick. 94, at 98, as follows: "Public easements, as well as others, may be shown by long and uninterrupted use and enjoyment, upon the conclusive legal presumption from such enjoyment, that they were, at some anterior period, laid out and established by competent authority." *Angell on Highways* (3d ed.), p. 144, and cases cited.

GEDGE *et als.* v. COMMONWEALTH

9 Bush (Ky.) 61. 1872

PRYOR, J. W. K. Wall on the 12th of August, 1852, conveyed to the President, Directors, and Company of the Covington & Lexington Railroad a small parcel of ground, situated in Harrison County and adjacent to the town of Cynthiana. The land conveyed, to use the language of the deed, was "to be held by the railroad company for the purposes of a depot for said road for freight and passengers and the necessary buildings pertaining thereto; including a street thirty feet wide on the east and west sides thereof, to be kept open for public use, but not to be used for sale to or speculation with others, or as lots or depot for live-stock." The railroad company took possession of the ground under the conveyance, and have been using it in conjunction with the public since the year 1854. This use consisted in the constant travel over the ground with horses, wagons, cattle, and persons having business at the railroad depot. The thirty feet of ground designated as the street by the conveyance referred to was never marked or staked off either as a street or road, and was never used or traveled over at any time, from its beginning at Bridge Street to its termination at or near the stock-pens. The use the public made of this thirty feet was in crossing it in order to get to the depot. The railroad company constructed a switch leading from the main tract over the ground, or a part of it, embraced in the deed from Wall, so as to obstruct the travel upon the thirty feet of ground designated as the street. The grand jury of Harrison County, at the September term, 1871, of the Circuit Court, found an indictment against the appellants, charging them with having erected and continued a nuisance in and across a public street and highway in the town of Cynthiana, in the county of Harrison, etc. The nuisance complained of consists in the construction of the switch by the railroad company already described.

The case was tried by a jury, resulting in a verdict and judgment against the appellants for four hundred dollars. The court having refused them a new trial, the case is now here on appeal.

It appears from the evidence in the case that neither the town of Cynthiana nor the County Court of Harrison County had ever accepted the dedication made to the public by Wall by any entry of record, nor in any other manner whatever, unless the mere user by the public in crossing this thirty feet of ground in order to reach the depot will imply such acceptance. The deed from Wall establishes the dedication of the ground for public use, and the only question to be considered is, Can the Commonwealth maintain an indictment against the railroad company for a nuisance in obstructing its way created by the grant from Wall in the absence of any other acceptance by the

public than the mere user in crossing it? The right in Wall to make the dedication of the ground to be used as a street or highway is unquestioned, but such a dedication does not compel the town of Cynthia to improve the street or keep it in repair. If the act dedicating the land makes it a street or highway, then it is within the power of any person to compel a town or county to improve or keep in repair a highway, whether desired or not. There must be some acceptance of the dedication, by the town if a street, or by the county court if a public road, before an indictment can be maintained against those whose duty it is to keep the street or road in repair, or against one or more for a nuisance in obstructing the travel, etc. If the mere travel on or across a way is a sufficient acceptance by the public of the dedication made, then every passway used by the public would be converted into a highway, and the county or town authorities liable for failing to keep them in repair. A road or street dedicated to the public must be accepted by the county court or town, either upon their records or by the continued use and recognition of the ground as a highway for such a length of time as would imply an acceptance. The continued use of a road by the public for fifteen years or more,¹ with the exercise of power on the part of the county court over it by appointing overseers, etc., would constitute it a highway; and where a dedication has been made of the ground by deed, as in this case, the marking out of the street by order of the town authorities, connected with its use by the public as a street, would be an acceptance of the grant. In the case of the State of *Maine against Bradbury* it is said that a way by dedication of the owner of the land does not become a public highway without user for twenty years, or an acceptance on the part of the town. In the case of *Curtis v. Hope* (19 Conn.), it was held "that to create a highway by adoption the road must be accepted by the public." In the case of *Willoughby v. Jenks* (20 Wendell), "that when a street is dedicated to the public it must be accepted or recognized by the local authorities as a public street." In *Oswego v. The Oswego Canal Co.* (2 Selden, 257) it is said "that anyone may lay out a way or thoroughfare through his own land, and may dedicate it to the public use, but such dedication does not confer upon the town in which the land lies the duty of improving or keeping it in repair," for the reason that there must not only be a dedication, but an acceptance also.

In the present case the ground, or the most of it, conveyed by Wall to the railroad company was left vacant and uninclosed from the year 1854 until the year 1868, and during this whole period the public used the ground of the company as much as they did the thirty feet of ground dedicated for the street. The entire open space was used by the public in their ingress and egress to and from the depot and cattle-pens of the company. The ground in controversy had never been

¹ This is the period of the statute of limitations in Kentucky for the recovery of real property. G. S. ch. 71, art. 1, § 1.

even marked out or used as a street by the trustees of the town of Cynthiana, and no acceptance by them, either expressly or by implication, of the dedication. The fact of the town limits having been extended so as to embrace the ground where the switch was constructed is not an acceptance of the benefit of the grant from Wall; and if the acceptance had been shown, still, as there was no street marked out or used by the public on the ground designated, this indictment could not be sustained against the appellants for the obstruction complained of.

For the reasons indicated the judgment of the court below is reversed, and the cause remanded with directions to award to the appellants a new trial, and for further proceedings consistent herewith.¹

117/199.204

What constitutes a dedication

- Cf. *Inglis v. Green* (1920) 191 P. 688

THE PEOPLE v. REED *et al.**

81 Cal. 70. 1889

THIS action was brought by the people on the relation of the mayor of the city of San José, to declare a certain strip of land to be a public street, to compel the defendants to remove certain buildings therefrom, and to enjoin them from maintaining said obstructions, and from setting up any claim of right to maintain the same thereon. The court found facts substantially as follows:

In 1862, one Reed caused a plan or map of his land and land of adjoining owners to be made, which platted it into streets, lots, and blocks. This plan was never recorded. Reed exhibited it, however, to persons interested in the property, and made conveyances and leases of lots owned by him by reference to it. Some of the proposed streets were afterward opened. Divine Street, which, as marked out in the plan, ran between three pairs of proposed blocks on Reed's land, was opened by the abutters, except between the middle blocks; it was never opened between those blocks. No sales of lots were made in those blocks; and, in 1867, Reed conveyed them, including the proposed section of Divine Street, as one parcel. The defendants have become the owners.

In 1884, more than twenty years after the map was made, and after the land had come to be occupied with buildings and fences, the city passed an ordinance declaring that the strip of land in controversy "be and the same is hereby dedicated and set apart to public use as a public street forever," and instructing the street commissioner

¹ Accord (acceptance must be by the municipal authorities): *Kelly's Case*, 8 Gratt. 632; *Attorney General v. Morris, etc., R. Co.*, 19 N. J. Eq. 386; *Bowers v. Suffolk Mfg. Co.*, 4 Cush. 332.

to demand possession thereof, and if possession was given, to remove all obstructions therefrom, and throw the same open to public use as a street of said city; and directing the city attorney, if possession were refused, to institute proceedings to recover the same for the city as a public street.

The court below concluded that the land had been dedicated as a public street, and gave judgment for the plaintiff. Defendant appealed.

W. Matthews, for appellant.

Attorney General Johnson and D. W. Herrington, for respondent.

WORKS, J. . . . In an early case this court said: "In dedication, no particular formality is necessary. It is not affected by the statute of frauds. It may be made either with or without writing, by any act of the owner, such as throwing open his land to public travel, or platting it and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate; or an acquiescence in the use of his land for a highway, or his declared assent to such use, will be sufficient; the dedication being in most, if not all, of the cases by matter *in pais*, and not by deed. The vital principle of the dedication is the intention to dedicate; and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. Time, therefore, though often a very material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If *accepted and used by the public in the manner intended*, the dedication is complete, — precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of the soil, being whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a highway." *Harding v. Jasper*, 14 Cal. 647.

It is well settled by the decisions of this court that the *making and filing* of a map, designating certain streets thereon, is only an offer to dedicate such streets to the public, and that the dedication does not become effectual and irrevocable until the same is accepted by the public. *Hayward v. Manzer*, 70 Cal. 476; *Harding v. Jasper*, 14 Cal. 647; *Sanderson v. Calderwood*, 31 Cal. 588; *San Francisco v. Canavan*, 42 Cal. 552; *People v. Williams*, 64 Cal. 502.

But it is not the mere making of the map, or its delivery or exhibition to private individuals, that constitutes the offer of dedication to the *public*, but the *filing*; and where the right to claim the street by the public rests *upon the map alone*, there is no offer to be accepted until the same is filed for record.

It may be otherwise with private individuals who have purchased some of the property on the faith of the map designating the streets, but this must be solely on the ground of estoppel, resting upon the rep-

representations made whereby parties have been induced to purchase on the faith of the implied statement that the designated streets were to be and remain open for public use. Such individual purchasers may, if it be shown that they acted on such representations, compel the opening of the streets, but if they do not, the public has no ground of complaint. No dedication or offer of dedication has been made to the public, and it is not an interested party. ^a

It is conceded by counsel for respondent that the portion of the street in controversy "has never been opened as a street," and that "on it the defendant had maintained a barn and shed and kept it inclosed with substantial fences for more than twenty years before this suit." They take the position, however, that where the owner surveys and plats his property, and *makes sales of lots with reference to such plat*, the streets designated thereon are irrevocably dedicated to the public as streets. There are authorities sustaining this position.¹ *Bartlett v. Bangor*, 67 Me. 464; *Carter v. Mason*, 4 Or. 339; *Stone v. Brooks*, 35 Cal. 494; *Grogan v. Hayward*, 6 Saw. 498; *Dill, Mun. Corp.*, 3d ed., § 640.

But it is manifest that no such rule can prevail in this State, where it has been uniformly held that the owner may, at any time before his offer of dedication is accepted by the public, withdraw the same. As between him and the public, therefore, his act alone is not sufficient to constitute an irrevocable dedication. As we have said, it may be different as between him and private individuals to whom he has made sales of property with reference to the map. Much of the confusion in the decided cases has, in our judgment, grown out of the failure to distinguish between the right of the public authorities to claim a dedication and the right of a purchaser to compel the opening of a street on the ground of estoppel. *Holdaw v. Trustees, etc.*, 21 N. Y. 474; *Child v. Chappel*, 9 N. Y. 257. In the case of *Grogan v. Hayward*, 6 Saw. 498, relied upon by the respondent, which was an action by a private individual, this distinction is clearly made. If the purchaser of property asserts his rights, the result may be the same, as to the mere keeping open of the street, as if a dedication is claimed by the public; but it does not follow that if he waives his right, the public can assert it, nor can the purchaser, by asserting his right to an open

¹ The following is quoted from *Bartlett v. Bangor*, 67 Me. at 464-5: "When the owner of land within or near a growing village or city divides it into streets and building lots, and makes a plan of the land thus divided, and then sells one or more of the lots, by reference to the plan, he thereby annexes to each lot sold a right of way in the streets, which neither he nor his successors in title can afterwards interrupt or destroy. And we think reason and the weight of authority are in favor of holding that such a platting and selling of lots constitute an incipient dedication of the streets to the public, which the owner of the land cannot afterward revoke. The dedication is not complete, and will impose no burden upon the public, till the streets are accepted by competent authority, or the public has used them for at least twenty years. But so far as the owner of the land is concerned, such acts constitute a proposition to dedicate, which he cannot afterward withdraw. Platting alone will have no such effect; but platting and selling will. There are dicta to the contrary, but the later and better considered cases hold to this view." See cases cited.

way, impose on the public the duty of keeping a street in repair that has never been accepted.

The case of *San Leandro v. Le Breton*, 72 Cal. 172, seems to overlook this plain distinction between the right of a purchaser and the public, but there it appeared that there was an acceptance by the public authorities, so that, so far as the opinion can be construed as militating against the rule above laid down, it is a mere *dictum*, and should have no weight.

Therefore, conceding that a platting of property and sale of lots constitute a dedication, as between the owner and purchasers under him, of the streets delineated on the map, in order to constitute a dedication which can be taken advantage of by the public authorities of a city, the offer of dedication must have been accepted by such authorities, either by user or some formal act of acceptance. *Harding v. Jasper*, 14 Cal. 647; *Hayward v. Manzer*, 70 Cal. 476; *Sanderson v. Calderwood*, 31 Cal. 588; *San Francisco v. Canavan*, 42 Cal. 552; *People v. Williams*, 64 Cal. 502; *City of Galveston v. Williams*, 69 Tex. 449; *State v. Trask*, 6 Vt. 355; 27 Am. Dec. 554, 563; *Gilder v. City of Brenham*, 67 Tex. 345; *Cook v. Harris*, 61 N. Y. 448; *Briel v. City of Natchez*, 48 Miss. 423; *Field v. Manchester*, 32 Mich. 279; *Hamilton v. Chicago*, 124 Ill. 235; *Fisk v. Town of Havana*, 88 Ill. 208. Numerous other cases to the same effect might be cited.

Such acceptance must be within a reasonable time after such offer of dedication, and if not accepted, the owner may resume the possession of the property and thereby revoke his offer. *Hayward v. Manzer*, 70 Cal. 476; *State v. Trask*, 6 Vt. 355; 27 Am. Dec. 554, 566; *Field v. Manchester*, 32 Mich. 279; *County of Wayne v. Muller*, 31 Mich. 447.

In this case there was no use of the street, and no attempt to accept the dedication by formal act of the public authorities for more than twenty years. This was not within a reasonable time, as shown by the authorities cited above, and therefore came too late.

But if this were not so, we think the ordinance passed by the common council of the city was not in any sense an acceptance of the dedication. It did not refer to the appellant or his alleged dedication of the street. As was well said in the former opinion, it appears more like an attempt to take private property for public use without compensation than an acceptance of the street.

There was neither a dedication to nor an acceptance by the public in this case. *Little v. City of Lincoln*, 106 Ill. 353; *Kennedy v. Mayor, etc.*, 65 Md. 514.

Judgment reversed, with instruction to the court below to conform its conclusions of law to the views expressed in this opinion, and to render judgment on the findings in favor of the defendant.

McFARLAND, J., SHARPSTEIN, J., FOX, J., PATERSON, J., and BEATTY, C. J., concurred.

THORNTON, J., dissented.

What constitutes acceptance offered...

ATTORNEY GENERAL v. ABBOTT

154 Mass. 323. 1891

INFORMATION, filed August 17, 1887, by the Attorney General, to prevent the defendant from interfering with Ocean Park, Hartford Park, and Waban Park, so called, in Cottage City, to which he claimed title under a deed from the Oak Bluffs Land Company, dated April 28, 1885. The case was heard in 1889, by FIELD, J., upon the pleadings and evidence reported by the commissioner and special master, and was reserved by him for the consideration of the full court, such decree to be entered as justice might require. The facts appear in the opinion.

The case was argued at the bar in October, 1890, and afterwards, in June, 1891, was submitted on the briefs to all the judges.

J. D. Ball & G. C. Abbott, for the defendant.

T. M. Stetson & H. M. Knowlton, for the Attorney General.

ALLEN, J. A perusal of the voluminous evidence, aided by the full briefs of counsel, shows to our satisfaction that there was an intention on the part of the owners of the parcels of land called Ocean Park, Hartford Park, and Waban Park to dedicate them to the use of the public as parks, and that the same were used by the public enough to show an acceptance thereof prior to the year 1880.

It will not be useful to state in much detail the evidence which leads to these results, or to discuss the particulars in which witnesses disagree or contradict each other. The general features, however, are as follows: In 1866, six persons united in a plan for making a place of summer resort at Oak Bluffs in Edgartown. One of them already owned a large lot of vacant land which was deemed suitable for the purpose. Each of the five others purchased an undivided sixth part thereof. A professional landscape gardener, Mr. Copeland, was employed to lay out the grounds in such a manner as would be likely to attract people who should come there only for the summer, and to induce them to buy lots, build cottages, and establish a village. In 1867 a deed of the premises was made to two of their number, as trustees for the benefit of the six owners; and in 1868 an act of incorporation was obtained, and the land was conveyed to the corporation. . . .

It is not necessary to go nicely into the question at what time the intention to devote these open spaces to the public became fully formed. There certainly was an intention that some spaces should be left open at an early day. Before the corporation was created a plan showing such spaces was prepared and put on record. Some changes were afterwards made in the boundaries. The land containing Waban Park was subsequently purchased. The limits of these three several open spaces were finally settled after the corporation was formed. For a time there was a somewhat fluctuating intention, so far as limits and boundaries were

concerned. But the limits as shown on the last two plans may be taken as representing the final conclusion of the corporation as to the limits of the spaces that were to be left open.

(The fact that not much was done to adorn these spaces, and that the corporation itself did whatever was done in this respect, and to some extent assumed to exercise a certain control over the land, is not of much weight in opposition to the conclusion to which we have come. The chief element of a public park in such a place, at least till the village is well settled, is to have the land kept open. The adornment would naturally come later, if at all. The corporation did a little towards improving and caring for these open spaces. It had some interest in doing so. Ordinarily, when parks are established for public use, the municipal authorities exercise control over them. *Washburn on Easements*, 146, 147, 156. It was not so here. Whatever was done was done by the corporation, which to some extent did what municipal authorities usually do. The corporation was interested in pushing its speculation, and as long as it had many lots left for sale it did something for the parks; but afterwards they were much neglected. }

On the whole, we think the evidence is sufficient to show an offer to the public of the spaces shown on the last two plans as Ocean Park, Hartford Park, and Waban Park. In *Attorney General v. Whitney*, 137 Mass. 450, where a majority of the court thought there was not sufficient evidence of such an intention, the evidence of dedication was far less strong.

† The acceptance of such a dedication at common law need not appear of record, and need not be by the town. The acceptance is by the public at large, and the principal thing to show it is use by the public. *Washburn on Easements*, 128, 139, 140. There is no need of a formal grantee. The fee remains in the original owner. *Cincinnati v. White*, 6 Pet. 431. y No assent of the town is necessary, because no burden is put upon the town, as in the case of a way. The improvements upon a park thus dedicated are left to be made by those who are interested. The town may take it up, or it may be left to individuals. If in a seaside summer resort no improvements at all are made, there will still be some benefit from having a space left for air, and for an open, unobstructed prospect. Whether the easement of a public park could be accepted merely by enjoying an unobstructed view over it of the ocean, need not be considered. Various other acts of use of all the parks are shown, sufficient to show an acceptance of them by the public. Such acceptance need not be very specific.

The defendant contends that such acceptance must have been by the town of Edgartown originally, or by the town of Cottage City afterwards. The chief argument in support of this view is, that there must be somebody who can be held responsible for the abatement of a nuisance, if one should exist upon the property; and that if the dedication is not to the town, and accepted by the town, there is virtually no owner of

the property. This argument is of force, but the technical answer is that the fee remains in the original owner. The dedication for a park carries only an easement. This easement is not in the town, but it is in the public at large. There may be inconveniences in this doctrine in cases which are supposable and possible, but the doctrine itself has been widely adopted, and has been expressly recognized as in force in this Commonwealth. *Abbott v. Cottage City*, 143 Mass. 521. We need not consider whether this mode of accepting a park has been done away with by the Stat. of 1882, c. 154. . . .

Decree for the plaintiff.

2. *Interest of a Municipality in a Public Way*

CITY OF DEMOPOLIS v. WEBB *et al.*†

87 Ala. 659. 1889

SOMERVILLE, J. The bill is filed by the city of Demopolis, a municipal corporation, to restrain the continuance of a fence erected by John C. Webb, one of the defendants, across Arch Street, a highway in said town, said obstruction being alleged to be a public nuisance, and sought to be abated as such. The bill further seeks to restrain the alleged unlawful collection of wharfage by the said Webb and his co-defendants at a steamboat landing on the margin of the Tombigby River, which is averred to be an appropriation of a part of said street, and an obstruction to the free use of said landing by the public. The highway in question, called "Arch Street," is alleged to be on the east margin of the river, running north and south, and extending from the low-water mark to the lots on the west side of the street, which are marked out and numbered on the map of the city. Said street is also designated on this map, and is alleged to have been duly dedicated to the public use.

There was a demurrer to the bill, some grounds of which were sustained and others overruled. The case comes before us on cross-appeals by both the complainant and the defendants. . . .

It is well settled that a fence or other like obstruction erected across a street is a public nuisance, and it may be such although the obstruction is created under an accompanying claim of title to the soil. A right of action at law will lie for its maintenance in favor of any one who may sustain from it a special or particular injury. For such nuisance an indictment will also lie, and any private person aggrieved by it may rightfully abate it by removal. *Stetson v. Faxon*, 31 Amer. Dec. 123, and note, 132; *Davis v. Mayor, etc., of New York*, 67 Amer. Dec. 186, note,

203; *Harrower v. Ritson*, 37 Barb. 303; *Milarkey v. Foster*, 25 Amer. Rep. 531.

Chancery, however, will often assume jurisdiction to abate such a nuisance by preventing its continuance through the aid of an injunction, where the fact of its existence is undoubted. This will be done either on the ground of the irreparable nature of the injury, or to prevent a multiplicity of suits liable to be occasioned by its repetition or continuance, or other grounds which render the remedy at law inadequate. The disturbance of easements, existing or threatened, will especially be restrained with much favor. 3 *Pom. Eq. Jur.* §§ 1350, 1351. Acting on these principles, this court, in *State v. Mayor, etc.*, 5 Port. (Ala.) 279, authorized an injunction to issue restraining the erection of a market-house in one of the public streets of the city of Mobile, which was pronounced to be such an obstruction in the highway as to constitute a nuisance. A like jurisdiction exists to abate a nuisance already created, the remedy at law being inadequate on the ground that one action, or even several, may not be sufficient to redress the plaintiff's grievances by reason of the continuous nature of the injury. An appeal to the chancery court, moreover, is a more orderly method of settling such disputes; being less apt to lead to breaches of the peace than the dangerous attempt to redress one's rights by taking the law in one's own hands. *Town of Burlington v. Schwarzman*, 52 Amer. Rep. 571; *Hoole v. Attorney General*, 22 Ala. 190; *Steam-Engine Co. v. Steam-Ship Co.*, 34 Amer. Rep. 652; *Dumesnil v. Dupont*, 68 Amer. Dec. 750.

That the city of Demopolis has the right to bring this suit is, in our judgment, clear, on both authority and principles of reason. Such jurisdiction was recognized and asserted long ago by the English court of chancery in *Mayor, etc., v. Bolt*, 5 Ves. 129, where an injunction was granted on the application of the corporate authorities of the city of London to prevent a nuisance which threatened to be dangerous to the lives of the citizens.

In *Trustees v. Cowen*, 4 Paige, 510, it was decided that the village of Watertown, in its corporate capacity, was so far the representative of the equitable rights of the inhabitants as to authorize the filing of a bill in its name to restrain the erection of buildings on a public square, which were declared to be a public nuisance, and liable to be abated as such.

So it was held in *Town of Burlington v. Schwarzman*, 52 Conn. 181, that one who unlawfully erects a fence across a public street in a town, and threatens to maintain it, could be restrained by injunction at the suit of the town. The court, among other reasons, thought that the liability of the town to pay damages in case of a person being injured by the obstruction a sufficient interest to enable it to appear as plaintiff in a complaint in equity to prevent the threatened destruction. An equally good reason is found in the power and duty to prevent and remove nuisances, and to keep a general control of and supervision over all municipal highways as incidental to the right to repair and improve

streets, to say nothing of the express power in the city charter "to open all streets as laid down on the maps of said city." City Charter, Acts 1872-73, pp. 305, 310, 311, § 19; *M. E. Church v. Mayor, etc.*, 97 Amer. Dec. 698, note 707; *Inhabitants of Greenwich v. Railroad Co.*, 24 N. J. Eq. 221. There would be a great defect of justice if the governing authorities of a town or city, charged as trustees with the duty of protecting the public rights, were compelled to sit still with hands tied, and witness the unlawful appropriation of the municipal highways to private use without any power to prevent so monstrous an evil.

Mr. Pomeroy, discussing the subject of public nuisances, observes: "A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney general in England, and at the suit of the State, or the people or municipality, or some proper officer representing the Commonwealth in this country." 3 *Pom., Eq. Jur.*, § 1349. See also 2 *Dill., Mun. Corp.* (3d ed.) § 659; 1 *High, Inj.* (2d ed.) §§ 768, 769.

It is peculiarly appropriate, in our judgment, that this jurisdiction should be asserted in this age and country at the suit of towns and cities, as it harmonizes with the modern American theory of remitting the governmental management of local affairs, as far as convenient and practicable, to the local authorities; for, as said by a learned judge, "the law is made for the times, and will be made or modified by them." *Railroad Co. v. Applegate*, 8 Dana, 289.

It is needless to add that the action of ejectment for a highway by a municipality, even if the right be admitted to exist, as held by some authorities, is not a complete and adequate remedy, in a case of this nature. This suit, we hold, was properly brought in the corporate name of the city of Demopolis. . . .

Affirmed.

[The concurring opinion of McCLELLAN, J., is omitted. STONE, C. J., dissented on another point.]

3. Power to Obstruct or Alienate a Public Way

PETERS *et al.* v. CITY OF ST. LOUIS *et al.*†

226 Mo. 62. 1909

APPEAL from St. Louis City Circuit Court. Bill in equity by the commissioners of the South Market, in St. Louis, to enjoin the city and the city marshal from removing the market-house from Fifth Street, a public street. The market-house is a brick building, which was con-

structed under city ordinances in 1839. The ordinances provided that the expenses of construction and maintenance should be defrayed by contributions from individuals, and that proportionate shares should be issued to the contributors. The rents of the market were to be appropriated to the redemption of these shares, and the city reserved the right at any time to refund a sufficient amount to redeem them. Some of the shares are still outstanding. The ordinances declared the building to be a public market, and placed the management and control of it in the hands of three commissioners, to be elected by the shareholders. The commissioners were declared to be city officers, and the market was to be conducted in conformity with the ordinances of the city. The market-house is 36 feet in width and 375 feet in length, containing about forty stalls or places of business. Upon either side of the house is about thirty feet of the street. In other words, the public highway at this point is nearly one hundred feet in width, and the market place occupies 36 feet, practically in the middle thereof.

Wm. E. Wise and Kehr & Fottmann for appellants.

L. E. Walther and B. H. Charles for respondents.

GRAVES, J. . . . But to the proposition as to the right of the city to pass the two ordinances in question. If the city had such power there is an end to this controversy. It appears that other market places were established about this time and they too were placed in the public streets. This, however, does not change the legal status of all such ordinances and of all such acts. Such could only be considered as tending to show the city's construction of its own powers, and not further. To our mind the ordinances in question, as well as all similar ordinances, are void for the reason that they exceed the lawful powers of a municipal corporation, such as we have involved here. Where land has been dedicated as a street and thereby dedicated to public use, the same cannot be diverted from that use in the manner indicated in these ordinances. Licenses may be granted to street railways, which, for a public purpose, will subject the use of the street to additional burdens, but neither the street itself nor any portion thereof is absolutely withdrawn from use by the general public. Under such grants it has been subjected to an additional use. Not so with reference to the two ordinances in question. These ordinances absolutely withdraw from public use a material portion of a public highway. They do not merely encumber such highway with an additional public use, but absolutely withdraw the same from public use. This we say advisedly, for it is argued that the use to which the street was subjected under these ordinances is a public use. In a sense that is true. The market accommodated that portion of the population adjacent thereto, but not the general public. Public streets are for the general public and not for local interests. Licenses to railway corporations are tolerated on the theory that their limited use of the public thoroughfare is for the general public, but even such licenses cannot be tolerated when they oper-

ate in such a manner as to preclude the use of the streets in the usual and ordinary manner by the general public. *State ex rel. v. Railroad*, 206 Mo. 251, and cases cited therein.

Power to establish and control market places does not mean power to usurp the rights of the public in and to public streets. The case law seems to be firmly set this way. Dillon, with a citation of the case law (1 *Dill., Mun. Corp.* [4th ed.] § 383) says: "But power to a municipal corporation to establish markets and build market-houses will not give the authority to *build them on a public street*. Such erections are nuisances though made by the corporation, because the street, and the entire street, is for the use of the whole people. They are nuisances when built upon the streets, although sufficient space be left for the passage of vehicles and persons. Such erections may, it seems, be legalized by an express act of the Legislature. But unless so legalized, a nuisance erected and maintained by a public corporation may be proceeded against, criminally or otherwise, the same as if erected by private persons." [The court here cited and quoted from the following decisions: *Mayor v. Wilson*, 49 Ga. at 478; *Wartman v. Philadelphia*, 33 Pa. St. at 210; *Richmond v. Smith*, 148 Ind. at 296; *McDonald v. Newark*, 42 N. J. Eq. at 138.]

Many cases could be cited, but they all follow the trend of the original cases, and all are in harmony with the cases from this State, reviewed in *State ex rel. v. Wabash Railroad, supra*. A municipal corporation has no right to obstruct a public highway, by ordinance or otherwise, in the manner in which this highway is obstructed. What the city cannot do, it cannot by ordinance authorize individuals to do. The ordinances in this case upon which plaintiffs rely are void. They exceed the granted power of the city. . . . Something is said as to the statute of limitations, but this does not and cannot apply, for the reason that the plaintiffs throughout recognized that the building in question was one within a dedicated street. Plaintiffs claim under and through the city by reason of these ordinances and not otherwise. They have never asserted an independent right of possession and do not in the pleadings assert it now. From first to last their claim has been one under the grant made by these two ordinances. . . . The judgment of the trial court which dismissed plaintiff's bill should be and is affirmed. All concur.

COSTELLO v. STATE *
STATHAKIS v. SAME
PAPALEXANDRAKIS v. SAME

108 Ala. 45. 1895

APPEALS from the criminal court, Jefferson County. Each of the appellants was convicted of the offense of maintaining a public nuisance in the city of Birmingham, in the form of a fruit stand occupying a portion of the sidewalk of a public street.

The undisputed evidence showed that Costello, for a year next before the commencement of the prosecution, kept and maintained a fruit stand, constructed of timber and lumber, so arranged as to display fruits, etc., for the purpose of doing business. It was situated on the inside portion of the sidewalk on Twentieth Street, in said city, between First and Morris avenues, and next to, and along by the side of, a four-story brick storehouse. It was 31 feet long, 3 feet and 8 inches wide, being 2 feet high at the lower or outer edge, and rising, as it receded in width towards the storehouse, to a height of 4 feet next to and adjoining the storehouse; the width at the top, and next to the storehouse, being 1 foot. The sidewalk was 15 feet wide. Prior to the erection of this stand, there was in the sidewalk, next to the building, an open way, leading to a room or cellar under the building; and in October, 1894, Costello covered this opening, and erected the fruit stand thereon, the stand occupying only the surface space occupied by the cover to the opening. The opening was made by the owners of the storehouse in the year 1887, and remained there until covered by Costello; the city authorities never having objected to it. The cellar or room to which it afforded entrance has not been used since the opening was covered. Costello kept the stand under a lease from the owners of the building.

So far as the legal questions presented by the records are concerned, there is no material difference in the facts of the several cases. There are slight differences in the dimensions of the stands. Two are for fruits, and one for candies and confections. They are located at different places in the city, but all on important and commonly used public sidewalks of the city; and they take up, practically, the same sidewalk space, and in the same manner. In the two other cases, there was no cellar opening.

It was shown by each of the appellants that he had been granted a license by the city to occupy the portion of the highway used for his fruit stand, under a city ordinance requiring the payment of a license tax of \$20 *per annum* for such privilege.

Upon the introduction of all the evidence, the court, at the request of the State, instructed the jury in writing as follows: "Gentlemen of the jury, if you believe the evidence beyond a reasonable doubt, you

should find the defendants guilty." To the giving of this charge in each of the cases, each of the defendants separately excepted.

Walker, Porter & Walker and *J. J. Altman*, for appellants.

Wm. C. Fitts, Attorney General, for the State.

HEAD, J. . . Here, then, we have, in either case, the undisputed fact, that, at least, $3\frac{1}{2}$ feet of the 15 feet width of sidewalk (nearly one-fourth), and nearly thirty feet of its length, were exclusively and permanently appropriated by the defendant to his private uses, to the entire deprivation of the public of the space so appropriated, and to this must be added, as a necessary legal inference from the fact that these stands were used for carrying on the business of selling fruits, etc., the permanent occupation of the sidewalk by the person or persons engaged in making the sales; and by the standing thereon, from time to time, day by day, of customers trading at such stands. The trial court was of opinion that these facts, of themselves, constituted, as matter of law, public nuisances, indictable as such, without requiring the prosecutor (as then and now contended for by appellants' counsel) to go further and prove that such erections actually incommoded the general public. It seems to us that the statement of the case necessarily precludes any other conclusion. It is not and cannot be denied that the public has the right to the use of the entire sidewalk for the purpose of passage and other public purposes; that the appellants have, without lawful authority, permanently appropriated, to their own exclusive use and enjoyment, material portions of the sidewalks in question, thereby wholly depriving the public of the use of such portions. An unlawful deprivation of a substantial legal right necessarily implies injury to the party so deprived: and it is so with reference to the right of the public to the free use of the streets. When it is established that a party has, permanently and unlawfully, obstructed a material portion of a public street which the public have a right to use, and, but for the obstruction, would use, for public purposes, it is thereby concluded that the public have been injured and put to inconvenience by reason of the obstruction, and this constitutes, in law, an indictable nuisance. Mr. Freeman tersely states the law, as extracted from the numerous authorities he cites, in his extended annotation of *Callanan v. Gilman* (N. Y. App.), 1 Am. St. Rep. 840 (14 N. E. 264), as follows: "The public have a right to passage over a street to its utmost extent, unobstructed by any impediments. Any unauthorized obstruction, which necessarily impedes the lawful use of a highway, is a public nuisance at common law." And Judge Ruffin, a distinguished jurist, said, in *State v. Edens*, 85 N. C. 526: "Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon, is, of itself, a nuisance, though it should not operate as an actual obstacle to travel, or work a positive inconvenience to anyone. It is an encroachment upon a public right, and, as such, is not permitted by the law to be done with impunity." Confusion of ideas upon this subject grows out of the fail-

ure to properly distinguish between street obstructions which are *per se* unlawful, and capable of working public detriment, and those which are not, in themselves, unlawful, but may be so, by virtue of circumstances necessary to be shown in evidence in order to establish the criminality of the act. There are classes of highway obstructions which may create public inconveniences, and yet are not unlawful. Mr. Freeman also makes these appear very clearly. After laying down the principle above credited to him, he proceeds, in the same annotation, to say: "Temporary obstruction and partial occupation of streets may, however, be justified on the ground of necessity. The street may be so obstructed by placing thereon materials for building or repairing, if it be done in such a way as to occasion the least inconvenience to the public, and the obstruction be not continued for an unreasonable length of time. So, too, a private person carrying on business may occupy a portion of the street for a reasonable length of time for the necessary purpose of receiving and delivering his goods. A street may also be used for the purpose of moving a building from one place to another, provided it be done in a reasonable and judicious manner. Streets may be lawfully used for other purposes than the accommodation of the traveling public, provided such use be not inconsistent with the reasonable free passage of travelers over them. Slight inconveniences and occasional interruptions in the use of a street, which are temporary and reasonable, are not illegal merely because the public may not, for the time being, have the full use of the highway. . . . If a person finds it necessary to obstruct a public street, he must see to it that the inconvenience to the traveling public be as slight as possible, and that it be allowed to continue for a reasonable time only. And a reasonable time is such as is necessary, in the ordinary course of business, for its removal. A teamster has no right to keep his team standing in the street in such a manner as to impede travel for an unnecessary length of time. If his wagon breaks down, and he is compelled to throw his goods upon the street, he must remove them out of the way in a reasonable time. A tradesman has no right to deposit his goods and wares on the street for the purpose of exposing them for sale. An individual has no right to appropriate a part of the street to his exclusive use in carrying on his business, even though enough space be left for the passage of the public. Nor has a storekeeper any right to use the sidewalk in front of his store as a sort of annex to his place of business. If a man's premises are not sufficiently extensive for the transaction of his business, without encroaching upon the street or sidewalk, he is bound to seek more spacious quarters elsewhere. The public convenience is paramount to the necessities of private individuals." No doubt, the habitual and constant occupation of a material portion of the sidewalk for displaying goods for sale, which would naturally interfere with public passage, would be declared a nuisance *per se*. Speaking of permanent structures, he says: "Permanent structures, obstructing streets and interfering with their

unimpeded use by the public, are nuisances, which may be abated, although there be space left for the passage of the public. The following are instances of such structures, held to be nuisances: A barn occupying nearly half the street in a populous village; a show case in front of a store extending beyond the house line; a bay window 16 feet above the sidewalk, and projecting $3\frac{1}{2}$ feet over the sidewalk; a bridge extending across a street from the second story of a building on one side of the street to the second story of a building on the opposite side, supported by the buildings, and being 13 feet and 3 inches above ground; hay scales in the street, in front of the owner's premises; a fruit stand encroaching upon the sidewalk; a show board extending $11\frac{1}{2}$ inches over the sidewalk in front of a shop; a wooden awning in front of a store, extending over the sidewalk. But in *Hawkins v. Sanders*, 45 Mich. 491, 8 N. W. 98, it was held that such an awning was not *per se* a nuisance. So, too, in *Osborn v. Ferry Co.*, 53 Barb. 629, it was held that a log of wood placed by the defendant in the public street, at the threshold of its gate, was a nuisance." Mr. Freeman collects and cites a great array of authorities in support of the principles he lays down. We have read the most of them, as well as a number of others, and they establish to our entire satisfaction that obstructions of the kind in the present cases are *per se* nuisances. Being in themselves, without more, unlawful infringements of the public right to have the free use of the whole of the streets, which includes the sidewalks, for the purposes for which the streets were dedicated or established, they are, without more, conclusive of public injury. In such cases, evidence would not be admitted that public injury did not result. Such evidence, beyond what the acts themselves manifest, would consist in the opinions of witnesses merely. One jury might accord such weight to such opinions as to result in conviction, another in acquittal, when the acts are, without dispute, identical and unlawful, and the legal consequences of both are necessarily the same. It would be a very discordant administration of justice to have Costello convicted and Stathakis acquitted, when both have, without question, committed the very same unlawful acts, with the same consequences, merely because one jury viewed the opinions of men, as to the consequences, one way, and another jury the other way. Inasmuch as the law, upon the undisputed facts, declares both the nature of the act and its consequences, such opinions will not be received.

The rule is different where one is charged with an improper and detrimental exercise of his public right to use the street. Thus, for instance, as we have seen, a merchant has the right to use the street for receiving and delivering his goods, but he must do so in a reasonable and proper manner, — in a manner that will not unreasonably impede public travel. The act of using the street for such purposes is not, in itself, unlawful. The unlawfulness of the act consists in the unreasonable manner of its performance, producing unnecessary public incon-

venience. These are the elements which give the character of wrong to the act otherwise right, and they must be proven, in order to establish the criminal offence. Indeed, it is not so much the improper manner of exercising the right which constitutes the criminal offense, as the inconvenience to the public which results from that manner. Judge Ruffin, in his opinion referred to *supra*, after stating the principle we quoted, in reference to permanent structures, drew the distinction between the two classes of cases, as follows: "But the very object of a highway is that it may be used; and, though travel be its primary use, it still may be put to other reasonable uses; and whether a particular use of it, which does not of itself amount to a nuisance, is reasonable or not, is a question of fact to be judged of by the jury according to the circumstances of the case. Unlike the case of a permanent obstruction just referred to, it is not the manner of using the highway which constitutes the nuisance, but the inconvenience to the public which proceeds from it; and, unless such inconvenience really be its consequence, there is no offense committed." Nothing can better settle the principle than this emanation from so distinguished a judge.

Our own adjudications support our conclusion: *State v. Mayor, etc., of Mobile*, 5 Port. (Ala.) 279; *Hoole v. Attorney General*, 22 Ala. 190; *City Council v. Wright*, 72 Ala. 411; *Webb v. City of Demopolis*, 95 Ala. 116, 13 South. 289. The following are also some of the many authorities upon the questions here raised: *Hart v. Mayor, etc.*, 9 Wend. 571; *Rung v. Shoneberger*, 2 Watts, 23; *Com. v. Wilkinson*, 16 Pick. 175; *People v. Cunningham*, 1 Denio, 524; *Johnson v. Inhabitants of Whitefield*, 18 Me. 286; *Graves v. Shattuck*, 35 N. H. 257; *State v. Berdette*, 73 Ind. 185 (a case of a fruit stand, like the present); *City of Allegheny v. Zimmerman*, 95 Pa. St. 287; *Reimer's Appeal*, 100 Pa. St. 182; *Bybee v. State*, 94 Ind. 443; *Smith v. Simmons*, 103 Pa. St. 32; *Callanan v. Gilman*, 107 N. Y. 360; *Yates v. Town of Warrenton*, 84 Va. 337; *Cohen v. Mayor, etc.*, 113 N. Y. 532, and 10 Am. St. Rep. 506, and note. Desty, in his work on Criminal Law, states that front steps are part of the building, and, when they project, the building is in the highway, and such structure is a nuisance at common law; citing *Com. v. Blaisdell*, 107 Mass. 235; *Hyde v. Middlesex Co.*, 2 Gray, 267. Also, a stall for the sale of fruits and confectioneries placed on a public footway is a nuisance, though rent be paid to the adjoining owner; citing *Com. v. Wentworth*, 4 Clark (Pa.), 324.

The fact that Costello's stand was erected on the covering of the open way to the cellar is of no importance. *Com. v. Wilkinson, supra*. It is not contended that the city authorities have any general power to permit or license obstructions of streets, otherwise unlawful. See *Webb v. City of Demopolis, supra*; *Cohen v. Mayor, etc., supra*. The authorities generally are against such power. The charter of Birmingham does not confer it. Its provisions in regard to streets look to the betterment of the streets for the public purposes for which they were dedicated

or acquired. They do not empower the city to permit the streets to be diverted from their public use to private purposes, by suffering individuals to obstruct and appropriate them. Such a thought was never in the legislative mind.

We are of opinion the judgments of the criminal court were right, and they are *Affirmed.*

WEBB *et al.* v. CITY OF DEMOPOLIS *

95 Ala. 116. 1892

BILL by the city for an injunction against obstructing a part of Arch Street, and taking wharfage for the use of a river landing upon or adjacent thereto. The amended bill alleged in substance that the street, which extends along the bank of the river, was established by dedication by certain proprietors in 1819, and that the dedication included all the land to low-water mark, and all rights in the landing place; that the defendant Webb has erected a fence across part of the street next the river, and is collecting wharfage for the use of the landing. The defendants demurred; and also answered denying the dedication, and alleging that the street, if dedicated at all, did not extend beyond high-water mark on the bank; and they further asserted by way of plea and answer, that the city has relinquished and forfeited her rights by non-user for more than forty years; and they pleaded laches, lapse of time, the statute of limitation, prescription, and equitable estoppel. On final hearing on pleadings and proof, the court below entered a decree overruling the demurrers, and enjoining the defendants. Defendants appeal.

Geo. W. Taylor and Jas. T. Jones, for appellants.

Geo. G. Lyon and Pettus & Pettus, for appellee.

McCLELLAN, J. . . . The Tombigbee River opposite the city of Demopolis is a navigable stream, on which the public have the right of transportation of persons and property free of all charges or imposts whatever, subject to such regulations as a government may deem just and expedient in conservation of the public easement. In juxtaposition to this easement is that other which the public have in Arch Street, and this latter extends to and ends only at the point where the former begins. There is, and in the nature of things can be, no particle or scintilla of space between that side of Arch Street farthest from the river and the water line of the river farthest from the town of Demopolis which is not covered by one or the other of these easements, and over which the public would not have the same right to pass and transport property as they would have along the course of Arch Street, or up and down

the current of the stream; and it follows as a necessary consequence that an obstruction to the use of this street for the purpose of going onto the river would be as violative of public right and as unlawful as an obstruction to its use for the purpose of going along it from one part to another of the town. These propositions are, to our minds, self-establishing results from the existence side by side, and extending to touch with each other, of these two public easements, and they are abundantly supported by authority. *Godfrey v. City of Alton*, 12 Ill. 36; *Haight v. City of Keokuk*, 4 Ia. 199; *Barney v. Keokuk*, 94 U. S. 340; *New Orleans v. United States*, 10 Pet. 717. . . .

Having thus reached the conclusion that the whole of Arch Street extending to low-water mark was dedicated to the public, it is next to be considered whether the easement vested in the public has been lost. It is strenuously insisted for appellants that it has been lost so far as respects that part of the street now occupied by them, including what is known as the "Lower Landing" on the river front of Demopolis, through the possession of themselves and their predecessors in ownership of the lower warehouse property for a great period of time, under an exclusive claim of right, and the application to these facts of the doctrine of prescription. On this question of possession on the part of appellants, and those under whom they claim, of the street and landing in question, the character of that possession, its duration, etc., a great mass of testimony has been taken by each side. We have read it carefully, more for the purpose of finding evidence of relevant and material facts than with a view to determining whether a possession of the character set up in the pleadings had existed, and, if so, for what length of time. These inquiries we deem entirely immaterial to any issue in the cause. Without going at all into them, or intending by what we say to indicate what our conclusion in respect to them would have been had they been deemed relevant inquiries, we will conclude for the argument that the appellants and their predecessors in ownership of the lower warehouse property have, without interruption, since 1844, had actual possession of said street, said lower landing, and the immediate approaches thereto; that this actual possession has all along been exclusive of the whole world; that continuously during all that time they have claimed title to said landing and the approaches, and so much of said street as has been occupied by them, and have claimed in all cases, and exercised at pleasure, the right to charge all persons for the privilege of using said landing as a wharf; and, further, that they have greatly improved the landing and approaches thereto — have, if you please, created the landing in the sense of building the approaches to it and providing all the facilities which now exist, or have existed, for reaching and going on the river at that point; or, in other words, we will concede everything which appellants claim as to the facts of their relation to this landing. But all this will not help them. The law applied to these facts does not enforce any result of benefit to them. No statute of limitation

or principle of repose obtains here. Neither the statute of limitation, nor the rule which carries title by adverse possession, nor the doctrines of staleness, equitable estoppel, or prescription, can be invoked or applied against the right of the city of Demopolis and of the public to have this street opened from end to end, and from side to side, from the municipal line on the north to the municipal line on the southeast, and from the numbered lots of the town to low-water mark of the stream, and devoted to the uses to which it was dedicated by the original proprietors in 1819. The city never had any alienable title or right in the street; it could never have granted it, or any part of it, away for any purpose whatever. Having no power of direct alienation, it could not pass title indirectly by submitting for the statutory period to private possession, claim, and use. Having no power to grant it, no grant can be presumed from the lapse of time, however great, during which it has allowed respondents to deal with a part of it as belonging to them. Respondents, being held to know — a rule the propriety of which is emphasized here by the muniments of their title to the warehouse property, which show the fact — that all the space between their lots and the low-water line of the river was in and constituted Arch Street, expended money and labor in putting improvements thereon at their own peril, and in recognition of the right of the city to deprive them of all private benefit therefrom by throwing the entire street open to the free use of the public whenever the municipal authorities deemed it expedient so to do; and hence no element of equitable estoppel against the public enters into their claim. These positions are well grounded in text and adjudged cases, including recent adjudications of this court. Judge Dillon, after stating the views of several courts of last resort on the subject, sums up what he considers the true doctrine as follows: "Municipal corporations, as we have seen, have in some respects a double character — one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts of a private nature, there is no reason why such corporation should not fall within limitation statutes, and be affected by them. . . . But such corporation does not own and cannot alien public streets or places, and no mere laches on its part or that of its officers can defeat the right of the public thereto." 2 *Dill., Mun. Corp.* § 675. And the author incorporates in the text the views of the Supreme Court of Pennsylvania to this effect: "Streets and public squares are dedicated or acquired for the public use, not alone for that of the people of the city, the corporation being the mere trustee for the public; that erections by private persons on property thus dedicated or acquired cannot be authorized by the original proprietor, or by the city corporation, and can be authorized only by the legislature; that unauthorized erections or obstructions thereupon are public nuisances; . . . and that, in the absence of a grant shown from a competent source, no presumption from mere lapse of time can be made to support a public nui-

x } sance which is an encroachment on a public right." And he quotes with approval from an opinion of Mr. Justice Sergeant the following language: "These principles of law, as well as our own Code, are essential to the protection of public rights, which would be gradually frittered away, if the want of complaint or prosecution gave the party a right. Individuals may reasonably be held to a limited period to enforce their rights against adverse occupants, because they have an interest sufficient to make them vigilant. But in public rights of property each individual feels but a slight interest, and rather tolerates even a manifest encroachment than seek a dispute to set it right." 2 *Dill., Mun. Corp.*, § 669; *Com. v. Alburger*, 1 Whart. 469, 488; *Sims v. Chattanooga*, 2 Lea, 694; *Mayor, etc., of Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. 557, 561. And this doctrine has been fully adopted by this court in more than one case, the last being that of *Reed v. City of Birmingham*, 92 Ala. 339, 348, 349, citing *Olive v. State*, 86 Ala. 88, where the same principle is "broadly asserted," quoting as above from *Dillon on Municipal Corporations*, and as follows from *Elliott, Roads & S.*, 490: "There can be no rightful permanent possession of a public highway for private purposes; and, although a right to maintain a private nuisance may in some cases be acquired by prescription, no length of time will render a public nuisance, such as the obstruction of a highway, legal, or give the person guilty of maintaining it any right to continue it to the detriment of the public" (see also *Elliott, Roads & S.*, 667 *et seq.*); and may now be said to be the established law of Alabama.

That the private use of a public highway of a character which is subversive of its use by the public as a thoroughfare may be perpetuated in any case by the invocation of the doctrine of estoppel *in pais* against the municipality in which the highway lies, we very much doubt. It would seem, on principle, that, inasmuch as the municipality has no alienable right in such highway, none which could be lost through its laches, or through actual private possession under a claim of exclusive right, but holds the *locus in quo* not only for itself and for its own citizens, but in trust for the public at large, whose rights therein are in no wise dependent upon anything the municipality may do or omit to do, nothing done or omitted by a city in the way of allowing, or even inducing, persons to make erections on a street which obstruct or interfere with its use could or ought to estop the public to have such obstructions removed, or to have them removed at the suit of their trustee and agent, the municipal corporation. Yet Judge Dillon says there may possibly be instances of such estoppel, but he adds that "such cases are exceptional in their character, and it would perhaps be going too far to say that the courts have distinctly established such a principle." 2 *Dill., Mun. Corp.* § 667. And the Messrs. Elliott, in their valuable work on Roads and Streets, say that, while some courts, "influenced, perhaps, by the hardship that would result from a contrary holding in the particular cases under consideration, have applied the doctrine of

equitable estoppel where the claimant had made expensive improvements," etc., yet it is doubtful, they say, "if the doctrine of these cases can be sustained upon principle," except perhaps where the city has by affirmative action misled the claimant. And the text proceeds: "It is difficult to conceive upon what principle an equitable estoppel can be securely placed in such cases, for the person who encroaches upon a public way must know, as a matter of law, that the way belongs to the public; that the local authorities can neither directly nor indirectly alien the way, and that they cannot divert it to a private use. As the person who uses the highway must possess this knowledge, and in legal contemplation does possess it, one of the chief elements of an estoppel is absent. An estoppel cannot exist where the knowledge of both parties is equal, and nothing is done by the one to mislead the other. In addition to this consideration may be noticed another influential one, already suggested in a different connection, and that is, the private use of the public way was wrong in the beginning, and wrong each day of its continuance, and it is a strange perversion of principle to declare that one who bases his claim on an original and continued wrong may successfully appeal to equity to sanction and establish such a claim. It is, at all events, a great stretch of the doctrine of estoppel, and a wide departure from the rules laid down by the earlier decisions, and confirmed by the modern authorities." *Elliott, Roads & S.*, 669, 670. We adopt the principle thus declared and it leads inevitably to the conclusion that on the facts of this case there was no estoppel resting on the city of Demopolis to assert the rights advanced by this bill; and if it were necessary to pass on the point in the present case we should be much inclined to hold that no act or omission to act on the part of the municipality with reference to obstructions in public streets could in any case raise up an estoppel against it to proceed in the interest of the public to have such obstructions removed, however long they had been allowed to remain in the street. This brings us to the final conclusion that the respondents had originally no right to obstruct any part of Arch Street, or to use any part of it as a private landing or roadway to a private landing, or as a public landing not free of charge for the right to use it, and that no element of right has been injected into their claim by the efflux of time or the duration and character of their occupation and use of a part of the street as their private property. . . .

Affirmed.

CITY OF EL PASO *v.* HOAGLAND *et al.*224 *II.* 263. 1906

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

In the year 1865 Thomas Hamilton, Jr., laid out and platted Hamilton's addition to the city of El Paso, with an alley 16 feet wide running east and west through the center of block 5 of the addition. The lots south of the alley were conveyed to Betsy Thompson in 1871. On November 7, 1881, James Thompson, husband of Betsy Thompson, and S. T. Rogers, representing the lots on the other side of the alley, presented their petition to the city council asking that the alley be vacated. The petition was referred to the street committee, and at the next regular meeting of the city council, on December 5, 1881, that committee reported in favor of vacating the alley, but in their report as entered of record the alley was described as being in block 6 instead of block 5. If the original report was in writing it has been destroyed. The record shows that the report was, on motion, received and adopted, but it does not appear that the ayes and nays were taken or that three-fourths of the members of the council voted for the motion. In 1882 a barn was built by James Thompson at the west end of the alley, resting on stone pillars and extending into the alley several feet. The barn was 21 feet long east and west, and a few years afterward an addition was built on the north side, of the same length and 9 feet wide, which was wholly in the alley. A coal shed 30 feet long was built east of the barn, with a brick wall which extended into the alley $3\frac{1}{2}$ feet. In addition to this building there is a fence and a concrete walk $2\frac{1}{2}$ feet wide and 27 feet long in the alley. The city, as such, never took possession of the alley or claimed any rights in it, and it was never open or used by the public. A woman who lived in an addition adjoining on the west, which connected with the alley, chopped down with an axe the gate or bars across the west end of the alley a number of times, more than twenty years ago, and Thompson as often replaced the gate or bars. That was the only interference with the possession or occupation of the alley by Betsy Thompson and her husband and the appellees. In 1885 the lots north of the alley were conveyed to Betsy Thompson. She died in 1900, leaving the appellee Nellie L. Hoagland her only heir-at-law, who still owns lots on both sides of the alley. In 1904 Thomas Hamilton, Jr., and wife executed a quitclaim deed of the alley to the appellee W. H. Hoagland. In 1905, appellant being about to take steps toward opening the alley, appellees filed their bill in this case, praying for an injunction restraining the city from interfering with their possession. The writ was issued and appellant answered the bill. Replication having been filed, the cause was referred to a special master in chancery to take the evi-

dence and report the same to the court. The evidence was taken and the facts above stated were proved, and the court, upon consideration thereof, entered a decree making the injunction perpetual. From that decree this appeal was prosecuted.

Streets and alleys are held by the municipal corporation in which they are situated, in its governmental capacity, for the use of the public, and in respect to them the municipality is not within the statute of limitations. Mere adverse possession of a street or alley for twenty years does not operate to divest public rights therein. *Lee v. Town of Mound Station*, 118 Ill. 304. The doctrine of equitable estoppel, however, is applicable to municipal corporations in respect to such rights, and they will be estopped, or not, according to the circumstances of the particular case and the requirements of justice. *Chicago, Rock Island and Pacific Railroad Co. v. City of Joliet*, 79 Ill. 25. The naked fact of possession by an individual or non-user by the public authorities for any length of time will not create such an estoppel (*City of Sullivan v. Tichenor*, 179 Ill. 97); nor will the fact that there are some trifling improvements on the property, such as a picket fence, maple tree, lilac bush, creeping vine and grass, the destruction or removal of which will not cause any substantial injury to the individual. *City of DeKalb v. Luney*, 193 Ill. 185. On the other hand, it was held in the case of *Jordan v. City of Chenoa*, 166 Ill. 530, where the appellant had been in possession of an alleged alley for more than twenty years and had trees growing on it, a house standing on a part of it and a hedge fence growing across the end of it, that the city was estopped from opening the alley. In that case there had been such non-user by the public and such conduct as would reasonably induce a belief that the alley had been abandoned by the city. In this case the alley was never opened or used by the city, and the city council adopted the report of the street committee recommending its vacation upon the petition presented to the council. The report of the committee gave the wrong number to the block, and the record does not show that such a vote was taken as would be operative to legally vacate the alley, but this alley was the one intended. There was no legal vacation, but the evidence is important as showing the intention of the city authorities at that time in respect to it. Taking all the evidence together, it was sufficient to show that Betsy Thompson and her husband were induced to believe that the alley was vacated and abandoned, and that the improvements in the alley were constructed in good faith. The buildings are of a permanent nature, and while they are not new or of very great value, they are of such a nature that if the city should be permitted to open the alley the appellees would suffer a substantial loss. It is claimed that there was some recognition of the existence of an alley by verbal admissions, but the evidence in that respect is insufficient to establish that fact.

The decree is affirmed.

Decree affirmed.

4. Public Rights as Against the Fee-owner

GRAY, C. J., IN DENNISTON v. CLARK

125 Mass. 216, at 221. 1878.

As stated by Chief Justice Parker, in the passage which is made the foundation of the learned argument for the plaintiff, "It is too clear to require any discussion, that the proprietor of land, over which a public highway has been laid, retains his right in the soil for all purposes which are consistent with the full enjoyment of the easement acquired by the public or by any corporation by authority derived constitutionally from the legislature." *Tucker v. Tower*, 9 Pick. 109, 110.

The owner of the land therefore retains his title in trees, grass, growing crops, buildings, and fences standing in the highway at the time of the laying out (unless he fails to remove them within a reasonable time after notice to do so), as well as in any mines or quarries beneath, which are not part of the surface of the earth upon and of which the highway is made. Gen. Sts. ch. 43, §§ 13, 39; *Goodtitle v. Alker*, 1 Kenyon, 427, 437, s. c. 1 Burr. 133, 143; *Adams v. Emerson*, 6 Pick. 57; *Commonwealth v. Noxon*, 121 Mass. 42; *Tucker v. Eldred*, 6 R. I. 404; *Overman v. May*, 35 Ia. 89. The decision in *Smith v. Rome*, 19 Georgia, 89, cited for the plaintiff, unless it can be considered as substantially a case of a quarry, cannot be upheld. *Dill., Mun. Corp.* (2d ed.) § 544, note.

But it is equally clear that the grant of such an easement to the public, or to the corporation to which its rights have been delegated, authorizes the doing of any act in the highway, including the digging down or raising the soil to any extent, that is necessary or proper to make and keep the way safe and convenient for the public travel.¹ *Callender v. Marsh*, 1 Pick. 418; *Smith v. Washington*, 20 How. 135; *Boston v. Richardson*, 13 Allen, 146, 159; *Pontiac v. Carter*, 32 Mich. 164. All acts done for the purpose of repairing the way are of this character, although they may require the removal of the soil from one part of the way to another; and it is accordingly well settled that the public in the case of a highway, or a turnpike corporation or a railroad company in the case of a turnpike or railroad, has the right, acting through proper officers, for the purpose of repairing the same high-

¹ It is held by all authorities (except the Ohio Supreme Court) that it is within the rights of the public, through the proper public authorities, to raise or lower the grade of a highway. The adjoining owner, whether or not he owns the fee, has no legal ground of complaint, even though the change of grade renders access to his property more difficult. See the cases cited by the court. Also, *Sauer v. New York*, 206 U. S. 536, and cases cited; *Selden v. Jacksonville*, 28 Fla. 558. As to the rule in Ohio, see *Crawford v. Delaware*, 7 Ohio St. 459; *Akron v. Chamberlain Co.*, 34 Ohio St. 328.

way, turnpike, or railroad, to take earth, gravel, or stones from one part and deposit them on another, although if the officer applies them to other uses he may become liable as a trespasser.

In *Adams v. Emerson*, for instance, in which an action was maintained by the owner of land over which a turnpike road had been laid out, against a servant of the corporation, for taking the herbage growing thereon, Mr. Justice Wilde, delivering the opinion of the court, said, "The *locus in quo*, although part of a turnpike road, is the soil and freehold of the plaintiff. He has the exclusive right of property in the land, subject however to the easement or rights incident to a public highway, such as the right of passage over it, and the right which the turnpike corporation has to construct a convenient pathway, and to keep it always in good repair. To accomplish these purposes, the corporation may dig up and remove from place to place, within the limits laid out for the road, any earth, sand, and gravel, and may dig or cut up sods and turf." 6 Pick. 58. See also *Phillips v. Bowers*, 7 Gray, 21, 26; *Burr v. Leicester*, 121 Mass. 241; *Jackson v. Hathaway*, 15 Johns. 447, 453; *Fish v. Mayor, etc., of Rochester*, 6 Paige, 268, 272; *Bissell v. Collins*, 28 Mich. 277; *Baxter v. Winooski Turnpike*, 22 Vt. 114; *Cole v. Drew*, 44 Vt. 49; *Chapin v. Sullivan Railroad*, 39 N. H. 564; *Aldrich v. Drury*, 8 R. I. 554.

In New England, at least; the same rule has been applied by law and usage to the taking of materials from one highway for the repair of another within the jurisdiction of the same municipal authorities. *Hovey v. Mayor*, 43 Me. 322; *New Haven v. Sargent*, 38 Conn. 50. In such a case, both highways must, for this purpose, be deemed as much parts of one plan of public improvement for the accommodation of the public travel, as if they formed parts of a continuous line of road called by one name, as in the case of a turnpike or of a railroad. In *Delphi v. Evans*, 36 Ind. 90, to which the plaintiff has referred us, although there are *dicta* inconsistent with this view, the decision appears to have been based upon the want of any such order of the city council as was required by statute.

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To prevent it to tele. Co. to put its line on pub. way w/o adl
compensation PIERCE *et al.* v. DREW *et als.* to the fee-owner
136 Mass. 75. 1883

BILL IN EQUITY against the selectmen of the town of Brookline and the American Rapid Telegraph Company of Massachusetts, to restrain the selectmen from granting to the telegraph company a location for its

posts and wires in Brookline. The defendants demurred to the bill for want of equity. At the hearing a decree was entered sustaining the demurrer and dismissing the bill; and the plaintiffs appealed to the full court.

The plaintiffs are owners of land on a certain street in Brookline, including the fee to the middle of the way. The selectmen, acting under Pub. Stats., ch. 109, are about to grant to the telegraph company a location along said street or way for their posts and wires. The bill goes upon the ground that this statute is unconstitutional.

A. D. Chandler, for the plaintiffs.

F. Morrison, for the defendants.

DEVENS, J. . . . As the chapter does not, in our opinion, provide for damages to the owner of the fee in the highway by reason of the erection of the telegraphic posts and apparatus, it is to be determined whether such a use of the highway creates a separate and additional burden, requiring an independent assessment of damages, for which the owner of the land was not compensated when the highway was laid out, and thus whether the omission of the act to provide for this compensation renders it unconstitutional.

It is to be observed that, for more than thirty years, the right to appropriate highways to this public use, without any compensation to the owners of the fee therein, has been asserted. . . . No right to take the private property of the owner of the fee in the highway is conferred by this act; all that is given is the right to use land, by permission of the municipal authorities, the whole beneficial use of which had been previously taken from the owner and appropriated to the public. It is a temporary privilege only which is conferred; no right is acquired as against the owner of the fee by its enjoyment, nor is any legal right acquired to the continued enjoyment of the privilege, or any presumption of a grant raised thereby. Pub. Sts., c. 109, § 15. The discontinuance of a highway would annul any permit granted under the statute, and no incumbrance would remain upon the land.

In *Chase v. Sutton Manuf. Co.*, 4 Cush. 152, 167, it is said by Chief Justice Shaw, "that where, under the authority of the legislature, in virtue of the sovereign power of eminent domain, private property has been taken for a public use, and a full compensation for a perpetual easement in land has been paid to the owner therefor, and afterwards the land is appropriated to a public use of a like kind, as where a turnpike has by law been converted into a common highway, no new claim for compensation can be sustained by the owner of the land over which it passes." The case itself goes further than the illustration used by the chief justice. It related to a claim made by an owner in fee of land which had been taken by a canal company by statutory authority, for the purpose of a navigable waterway, which company had been permitted by statute to sell its property to a railway company; but, although the two modes of transportation were entirely different, the

validity of the act was sustained, and the claim of the landowner for further compensation disallowed.

"It is well settled," says Mr. Justice Gray, in *Boston v. Richardson*, 13 Allen, 146, 160, "that when land, once duly appropriated to a public use which requires the occupation of its whole surface, is applied by authority of the legislature to another similar public use, no new claim for compensation, unless expressly provided for, can be sustained by the owner of the fee."

When land has been taken or granted for highways, it is so taken or granted for the passing and repassing of travelers thereon, whether on foot or horseback, or with carriages and teams for the transportation and conveyance of passengers and property, and for the transmission of intelligence between the points connected thereby. As every such grant has for its object the procurement of an easement for the public, the incidental powers granted must be so construed as most effectually to secure to the public the full enjoyment of such easement. *Commonwealth v. Temple*, 14 Gray, 69, 77.

It has never been doubted that, by authority of the legislature, highways might be used for gas or water pipes, intended for the convenience of the citizens, although the gas or water was conducted thereunder by companies formed for the purpose; or for sewers, whose object was not merely the incidental one of cleansing the streets, but also the drainage of private estates, the rights of which to enter therein were subject to public regulations. *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75; *Attorney General v. Metropolitan Railroad*, 125 Mass. 515, 517; *Boston v. Richardson*, *ubi supra*.

Nor can we perceive that these are to be treated as incidental uses, as suggested by the plaintiff, because the pipes are conducted under the surface of the traveled way, rather than above it. The rights of the owner of the fee must be the same in either case, and the use of the land under the way for gas-pipes or sewers would effectually prevent his own use of it for cellarage or similar purposes.

When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then known vehicles, or of using it in the then known methods, for either the conveyance of property or transmission of intelligence. Although the horse railroad was deemed a new invention, it is held that a portion of the road might be set aside for it, and the rights of other travelers, to some extent, limited by those privileges necessary for its use. *Commonwealth v. Temple*, *ubi supra*; *Attorney General v. Metropolitan Railroad*, *ubi supra*. The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. It is a newly discovered method of exercising the old public easement, and

all appropriate methods must have been deemed to have been paid for when the road was laid out. Under the clause to regulate commerce among the States, conferred on Congress by the Constitution of the United States, although telegraphic communication was unknown when it was adopted, it has been held that it is the right of Congress to prevent the obstruction of telegraphic communication by hostile State legislation, as it has become an indispensable means of intercommunication. *Pensacola Telegraph v. Western Union Telegraph*, *ubi supra* [96 U. S. 1].

No question arises as to any interference with the old methods of communication, as the statute we are considering, by § 8, guards carefully against this by providing that the telegraphic structures are not to be permitted to incommode the public use of highways or public roads. We are therefore of opinion that the use of a portion of a highway for the public use of companies organized under the laws of the State for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has been permitted by the legislature, is a public use similar to that for which the highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation.

There remains the inquiry, whether there is any objection to the statute because it does not provide a sufficient remedy for the owners of property near to or adjoining the way, who may be incidentally injured by the structures which the telegraph companies may have been permitted to erect along the line of the highway and within its limits. Such remedy is given by § 4 as the legislature deemed sufficient. We should not be willing to believe that the landowner thus injured would be without remedy, if the company failed to pay the damages lawfully assessed under this section, while it still endeavored to maintain its structures; but the only compensation to which such owner is entitled is that which the legislature deems just, when it permits the erection of these structures. The legislature may provide for compensation to the adjoining owners, but without such provision there can be no legal claim to it, as the use of the highway is a lawful one. *Attorney General v. Metropolitan Railroad*, *ubi supra*.

The clause in the Declaration of Rights which provides that, "whenver the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," is confined in its application to property actually taken and appropriated by the government. No construction can be given to it which can extend the benefit of it to the case of one who suffers an indirect or consequential damage or expense by means of the rightful use of property already belonging to the public. *Callender v. Marsh*, 1 Pick. 418, 430.

The majority of the court is therefore satisfied that the demurrer to this bill was properly sustained, and the entry will be,

Decree affirmed.

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C. ALLEN, J. [dissenting]. A minority of the court, consisting of MR. JUSTICE WILLIAM ALLEN and myself, are unable to agree with the majority of the court upon the principal question in this case, which is this: When the public has acquired an easement in land for a highway, by taking it under the right of eminent domain, by prescription, by dedication, or by grant, is an additional servitude to be deemed as imposed by appropriating the highway, under legislative authority, for the use of a line of electric telegraph, by the erection of poles and wires above the surface of the ground, so that the owner of an abutting estate and of the soil to the center of the highway is entitled to further compensation therefor? The corresponding questions are necessarily involved, whether, when land is taken for a highway by the right of eminent domain, it is to be considered as an element of the damages sustained by the owner, and to be paid by the city or town, that the land may be used, not merely for a highway, but also for a telegraph line; and whether, in case of a dedication or grant of land for a highway, with or without the payment of a consideration, the right of establishing a telegraph line along the highway, under the authority of general or special statutes, is also included by implication.

If such owner is in law entitled to further compensation, it is plain that the statute fails to meet the constitutional requirement, inasmuch as no adequate provision for such compensation is made. A mere right of action at law is not sufficient. *Connecticut River Railroad v. County Commissioners*, 127 Mass. 50.

It has been held in this Commonwealth and elsewhere, though without entire uniformity of decision, that the establishment of a street railway does not entitle the owner of the land to further compensation. *Attorney General v. Metropolitan Railroad*, 125 Mass. 515. Recognizing this decision as founded on just principles, the question remains, whether the same rule applies to other uses, and with what limitations, if any.

The great weight of opinion thus far expressed by courts is that street railways, with cars propelled by horse power, are not to be regarded as imposing a new servitude which will entitle the owner of the fee of the highway to additional compensation, but that steam railroads are to be so regarded. It is considered that the latter use is so far different in its nature, that the law ought to take notice that it could not have been within the contemplation of the parties that the laying out of an ordinary highway should also include such a mode of traveling. While it is always recognized that the proper and contemplated use of the highway is not to be deemed limited to such vehicles as are in use at the time, it is considered to be too great an extension of the easement acquired by the public to hold that it embraces its use for a steam railway. At this point the line has been drawn by a great weight of judicial decision. See *Williams v. New York Central Railroad*, 16 N. Y. 97; *Wager v. Troy Union Railroad*, 25 N. Y. 526, 535; *Jersey City & Bergen Railroad v. Jersey City & Hoboken Horse Railroad*, 5 C. E. Green, 61; *Imlay*

v. *Union Branch Railroad*, 26 Conn. 249, 255; *Grand Rapids & Indiana Railroad v. Heisel*, 38 Mich. 62; *Sherman v. Milwaukee, Lake Shore & Western Railroad*, 40 Wis. 645; *Kucheman v. Chicago, Clinton & Dubuque Railway*, 44 Ia. 366; *Kaiser v. St. Paul, Stillwater & Taylor's Falls Railroad*, 22 Minn. 149; *Southern Pacific Railroad v. Reed*, 41 Cal. 256; *Cooley, Const. Lim.* 546, 550; 2 Dill., *Mun. Corp.* §§ 722, 725.

The use of a highway for the purpose of communicating information by electricity, by means of posts and wires erected along its course, may, in a certain sense, be said to be a use for a purpose similar to that for which highways are established; namely, the increase of communication between persons at different points. But this is a somewhat remote analogy, and the more direct purpose of establishing highways is to enable persons and teams to pass more easily from one place to another. The analogy between a steam railway and conveyance by ordinary teams is much more direct. . . .

An argument has been drawn from the judicial sanction which has been given to the use of streets for drains and sewers, and for gas and water pipes. But there is a palpable distinction between such uses and that of the establishment of a telegraph line. It may be said, in a general way, that, when a highway is laid out, the whole beneficial use of the soil is temporarily taken from the owner and appropriated to the public use; and ordinarily the laying of underground pipes, in such a manner as to cause no injury to the adjoining land, does not deprive the owner of the fee of any use which he could otherwise have made of the soil. Ordinarily, therefore, he cannot be deemed to suffer any legal injury from the laying of underground pipes. A different question, however, might by possibility arise, if such pipes interfered with underground operations which the owner might carry on, notwithstanding the existence of the highway. Then, again, sewers and drains are built more directly by public officers, and usually are of direct benefit to the abutting estates, as well as to the streets themselves. The advantage to abutting owners is so apparent, that, under our statutes, they may be assessed for the expenses of construction. Gas pipes also are likely to be of direct service in furtherance of the purposes for which streets are laid out, aiding public travel, and benefiting the abutting lots. There is a general recognition that all these uses are directly subservient to the purposes for which highways are established; and, by statute, towns are authorized or required to lay water pipes, erect watering troughs and fountains, set out and maintain shade trees, erect guide-posts, and erect and maintain street lamps. Pub. Sts. ch. 27, §§ 37, 50; ch. 53, §§ 1-4; ch. 54, § 9. But the erection of telegraph lines along a highway is of no direct and peculiar benefit to travelers upon the highway, to the highway itself, or to abutting estates; and, as has been seen, such lines do or may interfere materially with the beneficial use and enjoyment which the owner of the soil might otherwise have of his estate.

The fact that the statute provides that no permanent easement shall

5. *The Abutter's Easement*

STORY v. NEW YORK ELEVATED RAILROAD COMPANY †

90 N. Y. 122. 1882

ACTION to restrain defendant from constructing its road in front of the plaintiff's premises.

DANFORTH, J. The plaintiff is the owner of land situated on the corner of Moore and Front streets in the city of New York, on which he or his grantors erected buildings. To their enjoyment, light, air, and access are indispensable, and are had through Front Street. The complaint states that the defendant is about to construct a railroad above the surface of that street, in such manner as will obstruct access to the buildings, and deprive the plaintiff of the benefit of light and air. The trial court has in substance found these matters in favor of the plaintiff, and among other things leading to that result, that the defendant intends to construct such road upon a series of columns, about 15 inches square, 14 feet and 6 inches high, placed 5 inches inside the edge of the sidewalk and carrying girders from 33 to 39 inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars intended for this road will, when placed hereon, have bodies 11 feet high above the tracks, in running will project 2 feet over the sidewalk on either side of the street, and will reach within 9 feet of the plaintiff's buildings. The defendant intends to run its trains as often as once in three minutes, and at a rate of speed as high as eighteen miles an hour.

The learned court found that this construction would, "to some extent obscure the light of the abutting premises; that the passing trains will also do this, and give to the light a flickering character objectionable for business purposes" "and to some extent impair the general usefulness of the plaintiff's premises;" "that the line of columns abridges the sidewalk and interferes with the street as a thoroughfare, where such columns are located;" that the structure "will fill so much of the carriage-way of the street as is more than fifteen feet above the road-way;" "that the fronts of the abutting buildings will be exposed to observation from passengers in the passing trains, and the privacy of those in the second or upper stories of the premises invaded." It is also found, that these things will be "of a constant and continuing character," and will "tend to the occasioning of incidental damages to the plaintiff's premises and depreciation of its value;" but also finds that the acts of the defendants producing these results would be lawful, and that the plaintiff has no cause of action. This conclusion rests upon the further finding that the mayor, aldermen, and commonalty of the city of New York are the owners in fee of Front Street,

opposite the plaintiff's lots, and that he is not, and never has been seized of the same in fee, nor had any estate or interest therein. The complaint was, therefore, dismissed, and an order made giving to the defendant an extra allowance of costs. From this order and from the judgment of dismissal the plaintiff appealed to the General Term, where both judgment and order were affirmed.

Although this statement is somewhat extended, it is evident that the essential facts of the case are within a narrow compass, and it will be found, I think, that the material legal question, however difficult to answer, is simple in its terms, and leads at once to the inquiry whether the scheme of the defendant involves the taking of any property of the plaintiff. If it does, the judgment in its favor is erroneous upon the substantial ground that the intended act, when performed, would violate not only the provision of the Constitution, which declares that such property shall not be taken without just compensation (Art. 1, § 6), but the statutes by which the defendant is bound (Laws of 1875, ch. 606; Act of 1850, ch. 140; Act of 1866, ch. 697; Act of 1867, ch. 489), or to which they owe their existence (Laws of 1867, ch. 489; Laws of 1875, ch. 606), and whose validity would not have been upheld, unless, in the opinion of this court, they provided means to secure such compensation. *In re Petition of Gilbert Elevated R. Co., to acquire land in the city of New York*, respondent, v. *Kobbe*, appellant, 70 N. Y. 361; *In re Petition New York Elevated R. R.*, *id.* 327.

The plaintiff contends, first, that as the owner of the abutting premises he has the fee of one-half the bed of the street opposite thereto and through which the proposed road is to be built; second, if the fee of the street is in the city, he, as abutting owner, has such right to air and light and access afforded by the street above the road-bed as entitles him to protect it and have it kept open for those uses, until by legal process and upon just compensation that right is taken from him.

In the first place I propose to discuss the second ground as of greater general importance than the other, and equally sufficient, if found in the plaintiff's favor, to sustain his case. It assumes that the fee of the streets is in the city of New York. The defendant justifies its intended acts through permission of that city. It is not material to inquire in what manner the city acquired its title, for the plaintiff's interest or title, whatever it is, was derived from it. His lots and the street in question are parts of a larger tract, which, prior to May, 1773, the city caused one of its engineers to survey and lay out into streets and lots, and designate upon a map.

By deeds dated respectively in May and in December of that year, they conveyed the lots in question to the grantees named therein, by metes and bounds. The street already referred to as Front Street is marked out upon the map under the name of Water Street, and if the

description of the premises conveyed does not include its bed — as I am now assuming that it does not — it at least brings it to the street and causes it to adjoin or front upon it. The lots and the streets are upon the map, and in the deed are described as being upon the “side of Water” (now Front) Street, so many feet and inches, “as by the survey made of this and sundry other lots by Gerard Bancker, one of the city surveyors, dated the tenth day of November, 1772, and filed in the office of the town clerk, will more fully appear, with the appurtenances thereto belonging or appertaining.”

The deeds contain a covenant on the part of the grantee, “to build and erect,” at his own expense, certain streets, and among others, the one now in question, “which said several streets” (it declares) “shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for, the inhabitants of the said city, and all others passing and returning through or by the same, in like manner as the other streets of the same city now are, or lawfully ought to be.” The trial court finds that Front Street occupies the strip of land which in those grants is mentioned as Water Street; that prior to their execution that street was projected across the lots thereby granted and conveyed, and that shortly after their execution, the street referred to was established and made by the grantees. The conveyance to the plaintiff describes the lot in question as “bounded northerly in front by Front Street aforesaid,” and the trial court finds that upon the same “is erected a warehouse occupying the entire front, and four stories high.”

It is not necessary to consider the effect of the circumstances I have now adverted to, upon the rights of the public in the street in question. It is conceded to be a public street. But besides the right of passage, which the grantee as one of the public acquired, he gained certain other rights as purchaser of the lot, and became entitled to all the advantages which attached to it. The official survey — its filing in a public office — the conveyance by deed referring to that survey and containing a covenant for the construction of the street and its maintenance, make as to him and the lot purchased a dedication of it to the use for which it was constructed. The value of the lot was enhanced thereby, and it is to be presumed that the grantee paid, and the grantor received an enlarged price by reason of this added value. There was thus secured to the plaintiff the right and privilege of having the street forever kept open as such. For that purpose, no special or express grant was necessary; the dedication, the sale in reference to it, the conveyance of the abutting lot with its appurtenances, and the consideration paid were of themselves sufficient. *Wyman v. Mayor of N. Y.*, 11 Wend. 487; *Trustees of Watertown v. Cowen*, 4 Paige, 510. The right thus secured was an incorporeal hereditament; it became at once appurtenant to the lot, and formed “an integral part of the estate” in it. It follows the estate and con-

stitutes a perpetual incumbrance upon the land burdened with it. From the moment it attached, the lot became the dominant, and the open way or street the servient, tenement. *Child v. Chappell*, 9 N. Y. 246; *Hills v. Miller*, 3 Paige, 256; *Trustees of Watertown v. Cowen*, 4 id. 514.

Nor does it matter that the acts constituting such dedication are those of a municipality. The State even, under similar circumstances, would be bound, and so it was held in the *City of Oswego v. Oswego Canal Co.* (6 N. Y. 257). "In laying out the village plot," say the court, "and in selling the building lots, the State acted as the owner and proprietor of the land; and the effect of the survey and sale in reference to the streets laid down on the map, was the same as if the survey and sale had been made by a single individual." Lesser corporations can claim no other immunity, and all are bound upon the principle that to retract the promise implied by such conduct, and upon which the purchaser acted, would disappoint his just expectations. *Child v. Chappell*, *supra*.

But what is the extent of this easement? what rights or privileges are secured thereby? Generally, it may be said, it is to have the street kept open, so that from it access may be had to the lot, and light and air furnished across the open way. The street occupies the surface and to its uses the rights of the adjacent lots are subordinate, but above the surface there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner. To hold otherwise would enable the city to derogate from its own grant, and violate the arrangement on the faith of which the lot was purchased. This in effect was an agreement, that if the grantee would buy the lot abutting on the street, he might have the use of light and air over the open space designated as a street. In this case it is found by the trial court, in substance, that the structure proposed by the defendant, and intended for the street opposite the plaintiff's premises, would cause an actual diminution of light, depreciate the value of the plaintiff's warehouse, and thus work his injury. In doing this thing the defendant will take his property as much as if it took the tenement itself. Without air and light, it would be of little value. Its profitable management is secured by adjusting it in reference to the right obtained by his grantor over the adjoining property. The elements of light and air are both to be derived from the space over the land, on the surface of which the street is constructed, and which is made servient for that purpose. He therefore has an interest in that land, and when it is sought to close it, or any part of it, above the surface of the street, so that light is in any measure to his injury prevented, that interest is to be taken; and one whose lot, acquired as this was, is directly dependent upon it for a supply, becomes a party interested and entitled, not only to be heard, but to compensation. The easement is property within the meaning of the Constitution and the statutes authorizing

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the construction of the defendant's road, as well as the warehouse upon the lot, by which it was used and enjoyed, and the owner is, in the language of the Act of 1850 (ch. 140, §§ 14, 15, 18), a person having an "estate or interest in real estate, so that if proceedings were instituted to condemn the street for railroad uses he would, as one of those persons, whose estate or interests are to be affected by the proceedings," be entitled to notice of the same (§ 14), and compensation (§ 16).

So under the Act of 1866 (ch. 697); it is supplementary to that of 1850, and embodies its provisions as to compensation, while the Act of 1867 (ch. 489), providing for the construction of an experimental line of railway in the counties of New York and Westchester, and under which the road of which the defendant is successor was empowered to act, declared that if in the course of its construction "private vaults or improvements are interfered with or occupied by said construction company, compensation therefor shall be paid by said company to the owner thereof," as in said act afterward provided (§ 6), and section 7 provides that any "private property used or acquired shall be compensated for by said company, under provisions of existing laws, authorizing the formation of railroad corporations, and the acquisition of rights of way therefor."

The plaintiff will also be within the terms of the provisions of the act entitled "An act further to provide for the construction and operation of a steam railway or railways in the counties of the State." (Chapter 606, Laws of 1875.) As, therefore, it is conceded that his consent to the proposed appropriation of the street has not been given, or compensation made or provided for, or the proceedings above referred to taken, it would seem plain that the cause of action stated in the complaint was made out. . . .

In *The City of Oswego v. The Oswego Canal Co.* (*supra*), it appeared that certain of the plaintiff's streets were appropriated by the defendant, under an act of the legislature (Laws of 1823, ch. 241), for the construction of a canal. In denying their liability to the plaintiff, Ruggles, Ch. J., says: "If the construction and maintenance of the canal deprived any of them (referring to the proprietors of lands within the plan of the village as laid out by the surveyor-general) of their easement in the land derived from its dedication, it was a proper subject of appraisal," and Edmonds, J., concurring, says: "There is nothing to show that these streets were public highways at the time the defendants were incorporated. All there is upon that subject is that the owner of the land sold it in lots, bounding them on those streets. This did not make those streets public highways. It gave, to be sure, certain rights to the purchasers of those lots in respect to the strips of land thus called streets, but that was all." What some of those rights are, I have endeavored to show. The case cited holds that they are property rights, and the loss of them a proper subject of compensation.

On the other hand, it is contended by the respondent, that the principles heretofore enunciated by the Supreme Court of the United States and the courts of this State as the grounds of their decisions in other cases, and especially by this court in *People v. Kerr* (27 N. Y. 188) and *Kellinger v. Forty-second Street Railway Co.* (50 *id.* 206), known as the surface railway cases, are at variance with this conclusion. It is due, therefore, to the importance of this case, and the elaborate and ingenious argument submitted by the respondent, that the cases so referred to be considered, viz.: *Transportation Co. v. Chicago* (99 U. S. Rep. 635). The claim against the city was for damages for obstruction to the plaintiff's docks by the deposit of materials, the construction of a cofferdam, and other work necessary in the building of a tunnel for the extension of a city street.

The work was a necessary city improvement, and the interruption and obstruction was temporary — ceasing with the completion of the work. It was held that the plaintiff could not recover, and this upon the principle applied and practiced upon in all our cities, that the municipality, whether owners of the fee of the street, or vested with an easement only, may repair and improve it, "to adapt it to easy and safe passage." It permits the leveling of a street by filling up, or digging away, and if intersected by a stream, the erection of a bridge or tunnel. If in doing either of these things materials are necessarily collected, or an excavation made, to the present and temporary detriment of a lot owner, he cannot complain. His ownership is subject to the exercise of this public right, and he must submit to the inconvenience in order that the street may be preserved. So in placing a pavement, or excavating for a sewer, the stone for one, and the dirt from the other, may for a time incommode the lot owner. To this, in like manner, he must submit, as to a burden provided for in his grant, or as one of the terms implied by his location upon a public avenue.

But the case would be quite different, if upon the cofferdam used in the construction of the tunnel, or upon the piles of rubbish or material, the city should erect a building, or from them extend the girders of a railroad, and I find nothing in the case cited which would prevent the lot owner from maintaining his action. In *Corning et al. v. Lowerre* (6 Johns. Ch. 439), Kent, Chancellor, restrained the defendant by injunction from obstructing Vesey Street in New York City, by building a house thereon, holding it was not only a public nuisance, but a special grievance to the plaintiffs, affecting the enjoyment of their property, and the value of it, and working a special injury to them.

In accordance with the distinction which I have suggested between the character of the obstructing acts, is the decision in *Barney v. Keokuk* (94 U. S. Sup. Ct. 324), a case also cited by the respondent. It is there held that there is no substantial difference between streets in which the legal title is in private individuals, and those in which it is in the public, as to the rights of the public therein, that in either

case the street is to be deemed open and free for public passage, and, agreeing in this respect with *People v. Kerr* (*supra*), for such other public uses as are necessary in a city, and do not prevent its use as a thoroughfare. Within this principle, its surface might be broken up for the insertion of gas or water pipes, or sewers, or occupied by rails imbedded therein for a surface railroad. But its limit would be found in these and like uses. It appearing, therefore, that the premises in question adjoined a wharf, affording access to a navigable stream, it was held, that a packet depot was reasonably located, on the ground that "it is a necessary adjunct to the steamboat landing, and the use of the wharf and levee for the purposes of navigation, and does not occupy any portion of the original street."

But on the other hand, the construction of a permanent freight depot in that street was deemed an unauthorized and improper occupation of it, because "subversive of and totally repugnant to the dedication of the street, as well as to the rights of the public."

The railroad structure designed by the defendant for the street opposite the plaintiff's premises is liable to the same objection as the house in Vesey Street (*Corning v. Lowerre, supra*), and the freight-house in the case last cited. It is true that travel on the surface of the street would, notwithstanding its erection, still be possible, but fifteen feet above it the street is wholly occupied, and light detained from the abutter's lots. The cases cited recognize private or special right in the individual, as well as a public right in a municipality — a substantial right and one to be protected.

Other cases cited by the respondent (*Lansing v. Smith*, 4 Wend. 21, and *Gould v. Hudson River Railroad Co.*, 6 N. Y. 522) involve the right of the State to deal with the navigable waters therein. They stand upon the assertion of an exclusive public right, common to every citizen, and deny a private right peculiar to an individual. But even in *Lansing v. Smith*, upon which the other rests, this right to regulate is stated by the Chancellor to exist, "provided the legislature do not interfere with vested rights which have been granted to individuals." In the case before us there is in effect a covenant securing to the plaintiff's grantor a right peculiar to the individual, and necessary to the lot conveyed.

It is no doubt true that the grade of a street or highway may be altered by raising or lowering it, without liability on the part of the municipality to the abutter, but this is on the ground that the public had already paid a full compensation for all damage to be done by them to the adjacent owners by any reasonable or convenient mode of grading the way. But the principle applicable to such a case does not aid the defendant. There is no change in the street surface intended; but the elevation of a structure useless for general street purposes, and as foreign thereto as the house in Vesey Street (*Corning v. Lowerre*, 6 Johns. Ch. 439), or the freight depot (*Barney v. Keokuk, supra*).

The plaintiff's case may also rest upon another ground. The tenure of the city, although, as I have assumed, in fee, is not absolute, but in trust for the purposes mentioned in the grant above referred to, and confers no other right or title upon the city than is given by the Street Opening Acts of 1691, 1787, 1801 (Colonial Laws, Vol. I, p. 8; Laws of 1787, ch. 88; Laws of 1801, ch. 129, or the Acts of 1813, 2 R. L., p. 408), entitled: "An act to reduce several laws relating particularly to the city of New York 'into one act,' where, in substantial repetition of the former acts, it is declared that the mayor, aldermen, and commonalty of the city of New York shall be seized of the lands taken for streets." "In trust nevertheless that the same be appropriated and left open for or as a part of a public street, avenue, square, or place forever, in like manner as the other public streets in the said city are, or of right ought to be."

The trial court has indeed found without qualification, that the mayor, aldermen, and commonalty of the City of New York are the owners in fee of Front Street opposite the plaintiff's premises, and if by this was intended any estate except as limited by the purposes prescribed by the grant or by the statute (*supra*), viz., the uses of a street, it would be necessary to sustain the plaintiff's exception thereto, and for this alone reverse the judgment. The decisions already made (*Matter of Seventeenth St.*, 1 Wend. 262; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-second St., etc., Railroad Co.*, 50 *id.* 206) show that the title is so limited. The argument of the respondent, however, proceeds upon that view of the title of the city, and the finding may be regarded as of that effect. It is, however, urged by the respondent, that the trust imposed upon the city is subject to legislative control. So far as the public or the city is concerned, this may be conceded, but a different question is presented when the rights of an adjoining owner are involved.

It is certainly well settled that where a grant is made or trust created for a specific and defined purpose, the subject of the grant or trust cannot be used for another and foreign purpose without the consent of the party from whom it was derived, or for whose benefit it was created. *Trustees of Watertown v. Cowen*, 4 Paige, 510; *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407; *Warren v. Mayor of Lyons City*, 22 Ia. (Stiles), 351. . . .

I find no difficulty in agreeing with the views of the learned Judge Emott in *People v. Kerr*, and those of the ingenious and able counsel for the respondent as to the propriety of extending the law of city ways to meet the demands of a progressive civilization, but to uphold this judgment requires us to hold that the way may be extinguished. This cannot be done even by the legislature, without compensation to the abutting owner. It would be a perversion of law and reason to construe a trust to keep open land for street purposes, as subject to such regulation as would destroy the street, or enable the legislature

or the municipality to grant away an exclusive right to any part of it. . . .

I also think the plaintiff may stand upon his first proposition, that he owns the fee of the street, and that the learned trial court erred in holding that the bed of Front Street was excepted from the grants to which I have above referred. Front Street was not then constructed. . . .

[The concurring opinion of TRACY, J., and the dissenting opinions of MILLER, EARL, and FINCH, JJ., are omitted.]

For reversal, ANDREWS, Ch. J., RAPALLO, DANFORTH, and TRACY, JJ. For affirmance, MILLER, EARL, and FINCH, JJ.

Judgment reversed.

ABENDROTH v. MANHATTAN RAILWAY CO. *et al.**

122 N. Y. 1. 1891

APPEAL from order of the General Term of the Superior Court of the city of New York, made May 12, 1887, which reversed a judgment of the special term dismissing the complaint on the merits and which granted a new trial.

This action was brought in November, 1883, to recover plaintiff's land and building on Pearl Street in the city of New York, alleged to have been caused by the erection and operation by defendants of an elevated railroad in said street; also to restrain the defendants from maintaining or operating the road, and to compel them to remove it.

The elevated railroad structure consists of a double row of hollow-latticed iron columns, set about opposite each other in the edges of the sidewalk, on each side of the street, at intervals along the street of about forty feet, each column being fifteen inches square, said pairs of columns being connected, at a height of about sixteen feet above the street, with open-work iron cross girders, upon which, along the street, were placed four open-work iron longitudinal girders, on which were laid, at a height of about twenty-two feet above the street, two railway tracks, consisting of iron rails placed upon wooden ties or sleepers.

The defendants, by their answers, deny that they have taken or impaired any of the rights of the plaintiff, and allege that he has acquiesced for five years in the construction and operation of the railroad.

The trial court found as facts the following: "The said railroad structure does not interfere with the air of plaintiff's building, or with access thereto, in any substantial degree." "That said structure is permanent, has and does fill a large portion of the space of said street in front

of plaintiff's said premises and seriously impairs his light; that said engines (those drawing the trains) emit smoke, gas, steam, and cinders which, at times, have and do enter the plaintiff's premises through his doors and windows, and cause him injury; that by reason of the facts aforesaid, the rental value of the plaintiff's premises has been seriously diminished . . . and his property has been and is permanently damaged and its value lessened."

Edward C. James and Julien T. Davies, for appellants.

Charles P. Cowles and Justus A. B. Cowles, for respondent.

Wm. H. Arnoux, for Charles S. Nine and others.

G. Willett Van West, for James P. Kernochan and others.

FOLLETT, C. J. The principal questions involved in this appeal are: (1) Has the plaintiff, by his ownership of a lot abutting on Pearl Street, private rights or rights of property therein? (2) Have the defendants taken or materially impaired those rights, if any the plaintiff has, within the meaning of the Constitution? The term "abutting owner" will be used in this judgment to denote a person having land bounded on the side of a public street and having no title or estate in its bed or soil, and no interests or private rights in the street except such as are incident to lots so situated. The evidence upon which the facts were found not appearing in the record, the findings of the trial court must be accepted as true. In addition to the finding that the plaintiff's lot does not extend beyond the line of the street, it should be noted that there is no finding that the plaintiff or any one of his predecessors ever had any title to or estate in the land whereon this street is maintained, or any interest in the street except that of an abutting owner. The view taken of the rights of abutting owners renders it unnecessary to consider the much debated and interesting historical question as to whether the island of Manhattan was, within the law of nations, so discovered, settled, subjugated, or possessed by the United Provinces as to impress upon it and its inhabitants the law of that country and the general rule of the civil law, that the title to the soil of highways and the beds of public streets is in the government. If the plaintiff, by virtue of being an abutting owner, has not sufficient private right or interests in this street to have enabled him to have maintained an action for the injuries found to have been inflicted, or for similar injuries inflicted without legislative authority, then he is without remedy in this case. In the cases about to be referred to, the plaintiffs were not all abutting owners, but none of them owned the part of the street whereon the obstruction or encroachment was placed which was the cause of the injury complained of. In *Corning v. Lowerre* (6 Johns. Ch. 439), the owner of a lot on Vesey Street was held entitled to maintain an action to restrain the defendant from obstructing the street. In *Van Brunt v. Ahearn* (13 Hun, 388), the parties owned lots on Catharine Street in Brooklyn. The defendant obstructed the street at a point some distance from the plaintiff's lot, causing him special damages, and it was held

that the plaintiff had such a private right, the right of free ingress and egress, that he could maintain an action to recover his damages and restrain the continuance of the obstruction.

In *Crooke v. Anderson* (23 Hun, 266), the parties owned lots on Washington Avenue in the city of Brooklyn, and the defendant encroached (not obstructed) on the part of the street which was in front of his lot, so that the street was less convenient for the plaintiff's use in going to and from his lot, thus specially damaging the plaintiff, and it was held that he could maintain an action to abate the encroachment.

In *Fanning v. Osborne* (34 Hun, 121, 102 N. Y. 441), the plaintiff was an abutting owner on Harden Street in the city of Auburn, and the defendant, without legislative authority, maintained a railroad track in the street, over which cars were drawn by the power of steam. It was held that the plaintiff (he showing that he had sustained special damages) had a sufficient private right in the street to maintain an action to restrain the operation of the railroad. The same doctrine was held in *Hussner v. B. C. R. R. Co.* (114 N. Y. 433).

In *Callanan v. Gilman* (107 N. Y. 360), two abutting owners on Vesey Street in the city of New York were engaged in business in adjoining stores. It was held that the plaintiff could, by action, restrain the defendant from improperly obstructing the sidewalk by using a temporary bridge or plankway by which goods were taken from and into the store, and thus causing a special injury or damage to the plaintiff.

In *Stetson v. Faxon* (19 Pick. 147), the parties owned adjoining lots in the city of Boston, which were bounded north by Ann Street and south by a street running along the north side of Market Square. The city laid out a new street south of the last mentioned one, and sold to the defendant the land between his lot and the new street, which had formed a part of the old street. The defendant erected fences and buildings on the land so purchased which impaired the value of the plaintiff's property by rendering it less convenient of access and obscuring the view. In an action to recover damages it was held that the old street not having been legally discontinued, the defendant was liable. The principle running through these cases has been maintained in England for at least two hundred years. *Maynell v. Saltmarsh*, 1 Keb. 847; *Fritz v. Hobson*, L. R. (14 Ch. Div.) 542. The same rule has been held applicable to country highways (*Pierce v. Dart*, 7 Cow. 609; *Hood v. Smith*, 5 Wkly. Dig. 117), and has received the sanction of the courts of most of the States of the Union. *Angell on Highways*, § 285. These cases do not rest on the fact that the wrongs happened to amount to public nuisances, for no person can maintain a private action for the recovery of damages against the creator or maintainer of a public nuisance unless it occasions him special damages by an immediate injury to his person or property, or by a consequential injury to his property. *Lansing v. Smith*, 8 Cow. 146, 4 Wend. 10; *Wood on Nuis.* 655. All of these cases were for the recovery of consequential damages to real property bounded

by the side or center of the street, or for the recovery of such damages sustained by occupants of such property, and in none of the cases were the obstructions or encroachments on or opposite to the property of the plaintiff. There are important differences between the case at bar and those cited. In the cases referred to, the acts which were held to be actionable wholly or partly obstructed the streets and rendered the property of the plaintiffs less accessible, and none of them were done pursuant to legislative authority; while in the case at bar the acts complained of were done pursuant to such authority, and do not, as found by the court, impair in any substantial degree the accessibility of the plaintiff's premises. But these cases do establish the principle that the owner of a lot on a public street, whether it extends across to the center, or only to the side of the street, has incorporeal private rights therein which are incident to his property which may be so impaired as to entitle him to damages. If this be not so, it is difficult to see how he can maintain any action except such as can be maintained by a stranger for an immediate injury to person or property caused by an obstruction while lawfully traveling in the street. The judgments in *Story v. N. Y. E. R. R. Co.* (90 N. Y. 122); *Lahr v. M. E. R. Co.* (104 *id.* 268) seem to compel this conclusion. In *Story's* case importance was given to the language of a covenant contained in the grants dividing and conveying the lots forming a larger tract owned and granted by the city (of which *Story's* lot was a part), and to chapter 86 of the Revised Laws of 1813, under which the street was laid out. But the judgment in *Lahr's* case was not placed on the ground that any rights in or to the bed of the street had been granted or reserved to him, or to any of his predecessors; and it was held, some force being given to the Act of 1813, that he had rights of property in the street.

The learned judges who delivered the dissenting opinions in *Story's* case did not deny, but rather assumed that the abutting owner had rights of property in the street, and held that those of the public were paramount, that the rights of both arose and existed by virtue of the same authority, and that those of the abutting owner could, by legislative and municipal action, be further subordinated to the rights of the public for the purpose of affording additional and necessary facilities for the transportation of persons and property through the street. Since *Story's* case was decided, questions akin to the one under consideration have been discussed by the Court of Appeals. In *Mahady's* case (91 N. Y. 153), Andrews, J., in delivering the opinion of the court, said: "The plaintiff, though an abutting owner simply, the fee of the street being in the city, was entitled to the use of the street, and neither the legislature nor the city could devote it to purposes inconsistent with street uses, without compensation, according to the principle of *Story v. N. Y. E. R. R. Co.* (90 N. Y. 122)." Again, the same learned judge, in delivering the opinion in *Pond's* case (112 N. Y. 188), said: "The *Story* case (90 N. Y. 122) established the principle that an abutting

owner on streets in the city of New York possesses, as incident to such ownership, easements of light, air, and access in and from the adjacent streets, for the benefit of his abutting lands, and that the appurtenant easements and outlying rights constitute private property of which he cannot be deprived without compensation."

In *Powers v. M. R. Co.* (120 N. Y. 178), Brown, J., in his opinion said: "The facts of the *Story* case were not broad enough to necessarily cover the case of an abutting owner whose only property in the street was an easement for light, air, and access, and hence the right of such owners to maintain actions for damages was not finally set at rest until the decision in *Lahr v. M. E. R. Co.*" The cases last cited did not, perhaps, involve the question discussed in the remarks quoted; but it cannot be assumed that they were made without deliberation, for since *Story's* case this precise question has been much debated and hardly out of the minds of the judges of the court of last resort.

The judgments for damages which have been recovered and sustained against the elevated roads do not and cannot rest on the ground that the roads are public nuisances, for they were constructed pursuant to statutes; and besides, as before stated, a public nuisance does not create a private cause of action, unless a private right exists and is specially injured by it. The only remaining ground upon which they can, and do, stand is that by the common law the plaintiffs had private rights in the streets before the roads were built or authorized to be built. It is clear, we think, that these rights were not created by the statutes under which the corporations were organized, nor by the construction of the roads; nor do they exist by force of the judgment in *Story's* case; but they existed anterior to the construction of the roads, and have simply been defined and protected by the decisions made in the litigations against these corporations.

It being established that an abutting owner has property rights in the streets and that an action could have been maintained against the defendants for the recovery of the damages caused by their acts, had they been done without legislative authority, it becomes material to inquire whether such right of action is cut off because the road was constructed pursuant to such authority.

The constitution of this State provides: "Nor shall private property be taken for public use without just compensation."

It is settled by *Story's* case and *Lahr's* case that such rights as the plaintiff has in Pearl Street "are private property" within the meaning of the constitutional provision quoted; and these cases also hold that by the construction and operation of an elevated road in the street in front of an owner's premises, his rights are "taken for public use," within the meaning of the constitution. It follows that the authority conferred by the legislature to construct the road is not a defense to the action.

Fobes v. R., W. & O. R. R. Co. (121 N. Y. 505) does not decide that an abutting owner has not vested rights to light, air, and access in a

public street, which are incident to his lot and which are private property, within the meaning of the constitution; but that the operation, pursuant to legislative authority, by the defendant of its steam railroad on the grade of the street which was at about the natural surface of the ground, was not on actionable invasion of the abutter's right. The learned judge who wrote the opinion in that case thus defined the limits of the question to be discussed: "It (defendant) admits that plaintiff had an easement in the street in question, but it denies that it has occupied or appropriated it. Whether it has taken any portion of the plaintiff's easement in the street in question is what the defendant asks shall be decided by us, and it denies *in toto* any taking whatever of the plaintiff's property or any portion thereof."

The conclusion which we arrive at is, that the erection and operation of the elevated road in Pearl Street immediately in front of the plaintiff's premises in the manner and with the effect described in the findings of fact, was a material impairment of the plaintiff's right of property, for which he is entitled to recover compensation for the damages inflicted.

It is urged that if the plaintiff ever had a right of action, it has been lost by his acquiescence in the construction and use of the road by defendant. It is found that when the road was being built through this street the plaintiff forbade the New York Elevated Railroad Company to construct it, and threatened that corporation with litigation, but began no action until this suit was commenced, and in the meantime he has occasionally been a fare-paying passenger on the road. Had this action been brought in equity solely for the purpose of compelling the defendants to remove their structure, and if all persons having such interests in the elevated road as would entitle them to be heard before such relief could be granted, were parties to the action, personally, or representatively, this question might require some consideration; but in an action for the recovery of damages, the conduct of the plaintiff, as found by the court, and his delay in bringing the action, is not a defense.

The order should be affirmed and judgment absolute rendered against the appellants, with costs.

All concur.

Order affirmed and judgment accordingly.

BARROWS v. CITY OF SYCAMORE *

150 Ill. 588. 1894

ACTION against the city to recover damages for an alleged injury to real estate. A demurrer to the declaration was sustained, and judgment rendered for the defendant. Plaintiff appeals.

The cause of action set up in the declaration is that plaintiff is the owner of a certain lot in the city of Sycamore, with a two-story building thereon, fronting south and west on State and Main streets, which she uses and occupies as a residence and hotel; that the city "injuriously, unjustly, and wrongfully constructed, or caused to be constructed and erected, at or near the center of the intersection of said streets, and at a distance of about fifty-six and one-half feet from said hotel building, a standpipe or water tower" fifteen feet high, made of steel or iron plates five feet wide riveted together.

The allegations of damage are sufficiently described in the opinion.

Jones & Rogers, for the appellant.

Carnes & Duntun, for the appellee.

WILKIN, C. J. . . . It is insisted on behalf of the city, that being the owner of the fee in the streets, and having the absolute control over them, it had a right to build the standpipe in them, and that if injury resulted thereby to plaintiff's property it is *damnum absque injuria*. The soundness of this position depends upon whether the placing of a structure, like that described in the declaration, in the streets of a city, is consistent with the objects for which streets are established and held by municipal authorities in trust for the public use. The general rule long recognized by this court is, that, having the fee and exclusive control over streets, municipal authorities may appropriate them to any use not incompatible with the object for which they were established. *City of Quincy v. Bull et al.*, 106 Ill. 337, and cases there cited. In the application of the rule it has been held in the case cited, and others, that a city council may lawfully authorize the laying of railroad tracks upon, and water, sewer, and gas pipes under, public streets, and that property owners could neither enjoin such use, nor recover damages to property occasioned thereby. Laying pipes under the streets for the purpose of distributing water and gas and carrying off sewage, is lawful both because it is necessary for the health, comfort, and convenience of the inhabitants, and because it in no way interferes with and is not incompatible with the use of such streets for public travel. Railroad tracks may be lawfully laid in streets, for the reason, as stated in the *Moses* case cited in *Quincy v. Bull*, *supra*, "a street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation and passage shall be used." It was, however, held in *Stack v. City of St. Louis*, 85 Ill. 377, and cases cited to the same

effect in *Legare v. City of Chicago*, 139 Ill. 46, that in permitting the use of streets for other purposes than public thoroughfares, "the city has no right to so obstruct them as to deprive the public and adjacent property holders of their use as streets. The primary object is for ordinary passage and travel, and the public and individuals cannot be rightfully deprived of such use."

It does not follow, therefore, that because railroad tracks may be put on or pipes under the streets, structures like the one described in this declaration can be built in them. Water and gas pipes, with hydrants, lamp-posts and other appliances, are necessary for the distribution of water and light over the city, and the streets may be legitimately used for that purpose; but it would scarcely be contended that the water or gas works themselves could be lawfully built in a public street, as not being inconsistent with the public use. In fact, directly the contrary was held in *City of Morrison v. Hinkson*, 87 Ill. 587, as to water-works. It was there said: "But it is not conceded that the erection of a water tank in the center of the street, occupying one-half of the width thereof, and the erection and operating of a steam engine in connection therewith, even for the purposes of supplying the city and the residents thereof with water, is one of the uses of a street, as such, for which the ground may be appropriately used under a dedication thereof as a street. The owner of a lot adjoining a street does not take the same subject to any such easement." It is true, it was stated in that case that the proof did not show in whom the fee of the street was vested; but if the same could not be said here, there being no allegation in the declaration as to that fact, still, as shown by *Stack v. East St. Louis*, *supra*, and cases there referred to, the fact that the title is in the city gives it no right to pervert its use as a street. The fee simple title, though in the city, is held in trust for the public use, as a street. Nor do we regard the fact that the tank in *City of Morrison v. Hinkson* occupied more of the street, and was filled by machinery immediately attached, also in the street, distinguishes that case in principle from this. A standpipe is but a part of the machinery and appliances with which water is forced into the pipes throughout the city. There is no necessity for placing it in a public street, and, so far as appears in this case, neither the health, comfort, nor convenience of the public or individual citizens is promoted by so doing. Therefore, placing it there was an unlawful use of the street, and the dimensions of the structure, and the manner of operating it, in the decision of this case, affect only the question of damages, to be hereafter considered.

Our opinion then is, that the allegations of the declaration admitted by the demurrer show that the city wrongfully placed the structure in its streets. It does not, however, follow, that a good cause of action in the plaintiff is shown by her declaration. It is well settled, that for obstructions to streets, resulting in no special injury to an individual, the public alone can complain. *McDonald v. English*, 85 Ill. 232; *City of*

Morrison v. Hinkson, supra. The individual right, under our present constitution, is thus stated in *Rigney v. City of Chicago*, 102 Ill. 80: "While it is clear that the present constitution intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not, and never has, afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So, as to an obstruction in a public street, if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law. When the action is by an individual, the special injury is the gist of the action, and unless it is alleged and proved there can be no recovery." *McDonald v. English, supra.*

Under this rule it is too clear for argument that neither of the first three counts of the declaration shows a right of action in the plaintiff. The special injury attempted to be set up in each of these counts is, that her property has been depreciated in value because of the danger of the building being destroyed or damaged by the standpipe falling or being blown upon it, or by bursting and flooding it with water, but not a single fact is alleged upon which the apprehension of such danger can be based. In the first count nothing but the apprehension itself is alleged, and in the second and third, merely that it (the standpipe) is *liable* to fall, blow over or burst. Why the apprehension exists, or why it is liable to fall, etc., is left wholly to conjecture. It certainly will not be contended that the manner in which it is constructed, as shown by the declaration, necessarily renders it dangerous. No one will deny that such a structure could be rendered reasonably secure by proper stays and braces, though it might not be so without. True, as in the instances referred to by counsel for appellee, water towers and standpipes have fallen or been destroyed; but the same is true of buildings of every kind, — perhaps of all superstructures. If this one is liable to

fall, blow down, or burst, that liability must arise from certain facts, and those facts must be pleaded. Here we have nothing but the mere conclusion of the pleader.

The fourth count avers that "said standpipe obstructs the light to said plaintiff's hotel building and particularly to the parlor and sitting-room in the southwest corner," etc. We are unable to see why this is not a sufficient allegation of special injury to plaintiff's property to entitle her to recover. *Rigney v. City of Chicago, supra*. The extent of the injury is a question of fact, to be determined upon plea and trial.

We think the Circuit Court erred in sustaining the demurrer to the fourth count.

Judgment reversed.

GERHARD *et ux.* v. THE SEEKONK RIVER BRIDGE
COMMISSIONERS †

15 R. I. 334. 1886

EXCEPTIONS to the Court of Common Pleas.

Commissioners appointed under Pub. Laws R. I. ch. 349, of March 28, 1883, and acting under the authority given to them by that act, built a bridge across the Seekonk River from Providence to East Providence. The east part of the bridge passed over tide-flowed flats, and was supported at its end by a masonry pier which completely blocked Warren Avenue, a street in East Providence that had been a highway since A. D. 1735. The bridge continued Warren Avenue westerly, but its erection raised the avenue much above its former grade.

Persons owning realty on side streets which debouched on Warren Avenue at its former level, but which were cut off from Warren Avenue by the east pier of the bridge and the new grade of the avenue made necessary by the pier, presented claims for damages to the commissioners, and on the rejection of their claims appealed to the Court of Common Pleas, and on the dismissal of their appeals filed their exceptions in this court, charging that the dismissal of their appeals by the Court of Common Pleas was error.

Amasa M. Eaton & Edward C. Dubois, for appellants.

Nicholas Van Slyck, for appellees.

PER CURIAM. . . . The second question is whether the erection of an abutment of the bridge across Warren Avenue, thereby interrupting the use of the avenue as a thoroughfare, entitles the appellants to compensation. No portion of the land of the appellants is occupied by the abutment, and their only claim for damages arises from the fact that they are the owners of estates on Warren Avenue and upon other con-

tiguous streets, and are greatly injured in going to and from their estates by the obstruction, the value of their estates being thereby very much impaired. It does not appear from the statement that the appellants have any private right or easement in Warren Avenue unless they have it as abutters. The question therefore is whether the abutters upon a public street, simply as abutters, have any right of travel in the street as against the State which would entitle them to compensation if the street be obstructed under the authority of the State, in a case where no portion of the street in front of their abutting estates is occupied or obstructed. We do not think that they have any such right. The easement of travel which they enjoy is a public easement, and they enjoy it simply as a portion of the public. It is competent for the State, representing the public, to authorize the entire discontinuance of the street, and *a fortiori* its partial obstruction, at least so long as the abutters have, as they have in the present case, access and egress to and from their estates by other ways. This was expressly so decided in *Fearing v. Irwin*, 55 N. Y. 486; *Paul v. Carver*, 24 Pa. St. 207; *Bauer v. Andrews*, 7 Phila. 359. And see also *State v. Dexter*, 10 R. I. 341; *The People v. The Supervisors of Ingham County*, 20 Mich. 95. Some of the cases cited by the appellants seem to have been, or to have been assumed to have been, cases where the owner of a tract of land platted it into house-lots with intersecting streets and sold the lots by plat. In such cases, without doubt, the abutters acquire a private easement in the platted streets distinct from the public easement, and the State could have no power to destroy the street by an obstruction without compensation to the purchasers by the plat injured by such obstruction. The other cases which are in point are in conflict with the great weight of authority, and we are not disposed to follow them.

Exceptions overruled.

6. Regulation of Fee-owner's or Abutter's Uses.

IVINS v. CITY OF TRENTON †

68 N. J. L. (Sup. Ct.) 501. 1902

ON *certiorari* to review an ordinance.

The opinion of the court was delivered by

HENDRICKSON, J. The prosecutors seek to set aside as invalid an ordinance of the city of Trenton, approved March 18, 1902. The ordinance ordains that the erection, etc., of any stationary or swinging sign, or any stationary awning, shed, or other obstruction across the whole or any portion of any sidewalk, within that portion of the city

of Trenton embraced within certain bounds defined in the ordinance, shall be deemed and is thereby declared to be a nuisance.

It contains provisions empowering and directing the police department to prevent such erections or other obstructions across the whole or any portion of any sidewalk within said bounds, and to remove any such erection or obstruction there existing in front of any building where the owner or occupant neglects or refuses to remove the same after ten days' notice, in writing. A penalty of \$20 is also added in case of such neglect or refusal after notice.

The prosecutors are the owners of a brick store building and lot, known as No. 120 North Broad Street in said city, where for several years they have conducted the business of dealers in fruits, vegetables, and produce. They have an awning in front of their premises 25 feet 11 inches long, consisting of an iron frame and roof covered with boards and tin, 14 feet in height next to the building and 12 feet in height at the curb and extending over the whole sidewalk. This awning was constructed by the grantor of the prosecutors in 1886 and has been maintained there ever since. . . .

With regard to the suggestion that the ordinance is inconsistent with the abutters' property interests, we think the proposition is clearly untenable. The title of the abutting owner may run to the center of the street, as it generally does, but his rights must always be subservient to the public easement. He may make as of right all proper uses of the street, subject to the paramount right of the public user, and subject also to reasonable and proper municipal and police regulation. 2 *Dill., Mun. Corp.* § 656a; *Weller v. McCormick*, 23 Vroom, 470. In the latter case, Mr. Justice Dixon, in discussing the rights of the abutting owner, says: "He may use the highway in front of his premises, when not restricted by public enactment, for loading and unloading goods, for vaults and chutes, for awnings, for shade trees, etc., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel."

No decision has been cited, and we know of none in this State, which asserts the doctrine that the exercise of such rights by the abutting owner is not subject to municipal control.

Other authorities supporting this view are *Pedrick v. Bailey*, 12 Gray, 161; *Drake v. Lowell*, 13 Metc. 292; *Augusta v. Burum*, 93 Ga. 68; *Farrell v. New York*, 5 N. Y. Sup. 580, 672, and other cases cited in note 7 of 15 *Am. & Eng. Ency. Law* (2d ed.), 499.

The case of *State v. Higgs* (N. C.), 48 L. R. Ann. 446, was cited in behalf of the prosecutors, where an ordinance forbidding the suspension of signs over sidewalks was held invalid, as not being within the chartered powers of the municipality. This decision was reached by a divided court, and is clearly distinguishable from the case we are considering.

The result is to affirm the ordinance, with costs.

WOOD v. MEARS *

12 Ind. 515. 1859

APPEAL from Marion Court of Common Pleas.

Action to recover damages for injuries to plaintiff's buggy and harness and the death of his gray mare, alleged to have been caused by defendant's wrongfully and negligently leaving a pile of dirt and gravel in the highway, against which plaintiff drove in the night. The substance of the defendant's answer is —

1. A general denial.
2. That the obstacle complained of was a pile of sand, and the defendant had deposited it in the street near a building which he was erecting, for use in the same, leaving ample space for travel, and for a reasonable time only.
3. That the facts were as alleged in the second paragraph, and that an ordinance of the city of Indianapolis provided: "Persons engaged in building or making pavement, may deposit materials for such building or pavement, in any of the streets or alleys, for a reasonable time; but no person shall be authorized to fill up any gutter or channel for the passage of water, or so obstruct the said street or alley as to prevent the passing of carriages, nor occupy more than one-third of such street or alley," and that, by such deposit, he did not fill up any gutter or channel for the passage of water; nor did he so obstruct said street as to prevent the passing of carriages; nor did he occupy thereby, more than one-third of said street, and left open, unoccupied, and unobstructed, a large space of and upon said street, around said pile, to wit, 60 feet, along and through which the plaintiff might have safely driven his mare and buggy.

The fourth paragraph is described in the opinion, and the fifth was substantially like the second.

The plaintiff demurred separately to the second, third, fourth, and fifth paragraphs of the answer, and the demurrers were sustained. To the ruling the defendant excepted. Trial by jury on the general denial; verdict and judgment for the plaintiff; a new trial was denied. The ruling of the court on the demurrers, is assigned for error.

J. L. Ketcham and I. Coffin, for the appellant.

J. W. Gordon, for the appellee.

WORDEN, J. The general proposition needs the citation of no authorities in its support, that a person who, without fault or negligence on his own part, receives a bodily hurt, or suffers a damage to his horse or carriage, in consequence of a direct collision with an obstruction in the highway, is specially damnified, and may maintain an action against the author of the obstruction.

But this rule may be subject to some modifications and restrictions, in its application to particular cases. What would be deemed an illegal

obstruction, such as would render the party obstructing liable, in one place and under one set of circumstances, might not in another. The primary and principal use of a highway is for travel; but it is not clear that it may not, in many cases, be legally occupied, in some measure, for other purposes. Thus it is said by a late author on highways (*Angell on Highways*, § 25), that "A correct distinction has been suggested between a highway in the country, and a street in a populous commercial city; and it has been considered that the restricted use of highways in the country, has been that they have been needed for no other purposes; but such is not the case with the streets of a city. There are certain uses to which, in modern times, the latter have been generally applied — not uses merely conducive to, but almost necessary for, the comfort, health, and prosperity of the public; and they have been both sanctioned by custom, and approved by experience."

In *O'Linda v. Lothrop*, 21 Pick. 292, 297, it was observed by the court, that "What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation, and much on public usage. The general use and the acquiescence of the public, is evidence of the right. The owner of land may make such reasonable use of a way adjoining his land, as is usually made by others similarly situated. As to the reasonableness of the use, it may well be laid down, that in a populous town where land is very valuable, it is not unreasonable to erect buildings and fences on the line of the street and to place doors and gates in them so as when opened to swing over the street. When the owner of a lot in such a situation has occasion to build, and for that purpose, to dig cellars, he may rightfully lay his building materials and earth within the limits of the street, provided he takes care not improperly to obstruct the same and to remove them within a reasonable time. It is very obvious that without this privilege, it would be, in some situations, nearly or quite impracticable to build at all."

In the case of *The Commonwealth v. Passmore*, 1 Serg. and Rawle, 219, quoted with approbation in *The People v. Cunningham*, 1 Denio, 524, 530, Chief Justice Tilghman says: "It is true that necessity justifies actions which would otherwise be nuisances. It is true, also, that this necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle, a merchant may have his goods placed in the street, for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it."

But, on the supposition that the foregoing is a correct exposition of the law, we are of opinion that the second paragraph of the answer is defective in not showing a reasonable necessity for placing the building materials upon the street. There is no averment of facts showing such necessity, and the court cannot infer it from the fact that the building was being erected in a populous and thriving city. Such necessity should have been shown either by direct averment, or by facts from which it might be legitimately inferred. There was no error in sustaining the demurrer to this paragraph.

The third paragraph presents a different question. By this paragraph the defendant relies upon an ordinance of the city, whereby "persons engaged in building, etc., may deposit materials for such buildings, etc., in any of the streets or alleys, for a reasonable time," not occupying "more than one-third of such street or alley." This ordinance, it is alleged, was passed in April, 1852. We take it for granted that the city of Indianapolis surrendered her former charter, and became a municipal corporation under the act for the incorporation of cities, approved June 18, 1852.

This fact is conceded by counsel on both sides. By the 84th section of this act "All by-laws, ordinances, and regulations not inconsistent with this act, shall remain and be continued in force until altered or repealed by the common council of such city."

The ordinance in question was continued in force, unless it was inconsistent with the act.

The 57th section of this act is as follows, viz.: "The common council shall have exclusive power over the streets, highways, alleys, and bridges within such city, and to lay out, survey, open, straighten, widen, or otherwise alter the same, to make repairs thereto, and to construct and establish sidewalks, crossings, drains, and sewers. They may cause buildings and structures, in the way of any street or other public improvement, to be taken down and appropriated, upon the payment of damages, as hereinafter provided."

This section confers upon the common council plenary powers over the streets and alleys of the city. In the language of Harris, J., in the case of *Milbau v. Sharp*, 17 Barb. (S. C. R.) 437, in speaking of the charter of the city of New York — not broader in this respect than the section under consideration — "The corporation yet has the exclusive right to control and regulate the use of the streets in the city. In this respect it is endowed with legislative sovereignty. The exercise of that sovereignty has no limit, so long as it is within the objects and trusts for which the power is conferred. An ordinance regulating a street is a legislative act, entirely beyond the control of the judicial power of the State."

But it is objected that the act gives the common council no power to pass such an ordinance as that in question. After having enumerated various subjects upon which the council have power to pass ordinances

in the 25th section, and amongst others "to prevent the encumbering of streets, squares, sidewalks, and crossings, with vehicles, or any other substance or materials, whatever, interfering with the free use of the same," the 28th section provides that "the common council shall have power to make other by-laws, not inconsistent with the laws of this State, and necessary to carry out the objects of the corporation."

The ordinance in question is not inconsistent with the laws of the State, for the reason, if for no other, that it is within the express power and authority conferred upon the common council by section 57, above quoted; and, as by that section, they are invested with full authority over the streets and alleys of the city, ordinances, or by-laws, on the subject of streets and alleys, are necessary to carry into effect the power thus granted.

The ordinance, in our opinion, is not inconsistent with the act, and was continued in force.

This construction is objected to, because there may be an abuse of the power thus conferred upon the common council. The argument, although the court should not be unmindful of consequences, might well be addressed to the consideration of the legislature, who may at any time abridge the powers of municipal corporations, if they see cause to do so, but it cannot prevail with the courts against a plain and unequivocal legislative enactment.

It is insisted that the ordinance should be construed merely as a protection to the party thus using a street or alley from a prosecution by the city; but we think such construction cannot prevail. The common council having exclusive power over the streets, highways, and alleys within the city, have the right to determine to what purposes they may be applied, and under what circumstances, and to what extent they may be encumbered. In a populous city, where much business is carried on, and where buildings are being constantly erected, it becomes a matter of necessity that the streets should be used for many purposes other than travel; and it is peculiarly proper that each city should determine for itself what its wants and necessities, in this respect, demand. Having made such determination, and authorized persons building to place their materials in the street in the manner prescribed by the ordinance, such ordinance, in our opinion, affords a full protection, not only against the city, but all other persons, to every one acting under and within the ordinance.

This is not an unusual instance of the vesting of authority in municipal corporations. Mr. Angell (*Angell on Highways*, § 241), says: "This power of legitimating obstructions which would otherwise be regarded as nuisances, is not of such sovereign character that it may not be delegated either by a specific act, or by a general grant of authority. Thus, it is a usual provision in our railway charters, that the companies may lay their tracks across or upon public roads or streets, with the consent and under the direction of the town and city authorities.

Municipal corporations have also large powers of this description, by virtue of the authority with which they are invested for the regulation and repair of highways. They have an undoubted right, for instance, to obstruct and even entirely discontinue a highway, for the temporary purpose of repairing or regrading it. And in cities and villages there are many uses, aside from their mere use for foot passengers and vehicles moved by animal power, to which the municipal governments may devote the streets under their control for the promotion of health, trade, commerce, and the public convenience."

The paragraph in question, by its averments, shows the defendant to have been within the terms of the ordinance pleaded, and, in our opinion, the demurrer to it should have been overruled.

Per CURIAM. The judgment is reversed with costs. Cause remanded for further proceedings.

CHAPTER V

PUBLIC SERVICES

OPINION OF THE JUSTICES TO THE HOUSE OF
REPRESENTATIVES182 *Mass.* 605. 1903

THE following order was passed by the House of Representatives on January 14, 1903, and on January 16 was transmitted to the Justices of the Supreme Judicial Court. On January 28, the justices returned the answer which is subjoined.

Ordered, That the opinion of the Justices of the Supreme Judicial Court be required upon the following questions:

First, Is it within the constitutional power of the legislature to enact a law conferring upon a city or town within this Commonwealth the power to purchase coal and wood as fuel, in excess of its ordinary requirements, for the purpose of selling such excess, so purchased, generally to its inhabitants or others (1) at cost, (2) at less than cost, or (3) at a profit?

Second, Is it within the constitutional power of the legislature to enact a law conferring upon a city or town within this Commonwealth the power to purchase for the purpose of sale generally and to sell generally to its inhabitants or others (1) at cost, (2) at less than cost, or (3) at a profit, coal and wood as fuel?

Third, Is it within the constitutional power of the legislature to enact a law conferring upon cities and towns within this Commonwealth authority to establish and maintain municipal fuel or coal yards for the purpose of selling coal, wood, or other fuel generally to the inhabitants of such cities and towns or others (1) at cost, (2) at less than cost, or (3) at a profit?

Fourth, If the answer to any of the foregoing questions be in the negative, does the power so declared as non-existent exist in the case of an extraordinary emergency, and may the different cities and towns be constituted judges of said emergency? . . .

[The following is the joint opinion of all the justices except MR. JUSTICE LORING, who wrote a separate opinion which is omitted.]

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

In reply to your order of January 14, 1903, a copy of which is an-

nexed, the Justices of the Supreme Judicial Court respectfully give the following opinion.

The first three questions submitted to us are substantially the same as the three submitted to the justices on April 12, 1892, the answers to which appear in the Massachusetts Reports, vol. 155, p. 601. We adopt and reaffirm the doctrines stated in the first of the opinions then submitted to the House of Representatives. A separate opinion, then submitted by another of the justices, rests upon the same principles as the first. We do not deem it necessary to restate the reasons and arguments which have led legislatures and courts to nearly, if not quite, uniform conclusions in regard to the attitude which the government should maintain, under existing constitutions, towards the transaction of common kinds of business which can be conducted successfully by individuals, without the use of any governmental function. These can be found in numerous published opinions of the courts, some of which are cited in the opinion first above mentioned.

It is established that under our Constitution private property cannot be taken from its owner except for a public use. This is equally true whether the property is a dwelling house taken by right of eminent domain, or money demanded by the tax collector. The establishment of a business like the buying and selling of fuel requires the expenditure of money. If this is done by an agency of the government there is no way to obtain the money except by taxation. Money cannot be raised by taxation except for a public use.

Until within a few years it generally has been conceded, not only that it would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing or selling goods in competition with individuals, but also that it would be a perversion of the function of government for the State to enter as a competitor into the field of industrial enterprise, with a view either to the profit that could be made through the income to be derived from the business, or to the indirect gain that might result to purchasers if prices were reduced by governmental competition. There may be some now who believe it would be well if business was conducted by the people collectively, living as a community, and represented by the government in the management of ordinary industrial affairs. But nobody contends that such a system is possible under our Constitution. It is plain, however, that taxation of the people to establish a city or town in the proprietorship of an ordinary mercantile or manufacturing business would be a long step towards it. If men of property, owning coal and wood yards, should be compelled to pay taxes for the establishment of a rival coal yard by a city or town, to furnish fuel at cost, they would thus be forced to make contributions of money for their own impoverishment; for if the coal yard of the city or town was conducted economically, they would be driven out of business. A similar result would follow if the business of furnishing provi-

sions and clothing, and other necessities of life, were taken up by the government; and men who now earn a livelihood as proprietors would be forced to work as employees in stores and shops conducted by the public authorities.

Except for the severely onerous conditions from which we are now suffering, the causes of which arose outside of this State beyond the reach of our legislative enactments, there is nothing materially different between the proposed establishment of a governmental agency for the sale of fuel, and the establishment of a like agency for the sale of other articles of daily use. The business of selling fuel can be conducted easily by individuals in competition. It does not require the exercise of any governmental function, as does the distribution of water, gas, and electricity, which involves the use of the public streets and the exercise of the right of eminent domain. It is n't important that it should be conducted as a single large enterprise with supplies emanating from a single source, as is required for the economical management of the kinds of business last mentioned. It does not even call for the investment of a large capital, but it can be conducted profitably by a single individual of ordinary means. We therefore have no hesitation in answering the first three questions in the negative.

No need of

The fourth question presents greater difficulties. . . . The only condition referred to in the question is "an extraordinary emergency," and the conditions referred to in the accompanying bill are "a scarcity of fuel and a pressing need thereof," and "a reasonable ground of belief that such a condition will occur in the near future."

Looking to the possible consequences of the emergency for which a remedy is desired, they can be divided into four classes: First, an increase of the number of those who fall into distress and are in need of relief from the public authorities, because they have no means to buy fuel at a greatly increased price. Secondly, increased expenditure, to their serious detriment, by those who have the means to buy. Thirdly, a possibility of a famine in fuel, such as to make it impossible reasonably to supply the needs of the community for comfortable living. Fourthly, a scarcity falling short of a famine but so great as to create widespread and general distress in the community which cannot be met by private enterprise.

The first of these possible consequences does not call for legislation. Cities and towns now have ample power to provide in any reasonable way for paupers, whether it be by furnishing out-of-door relief or by support in almshouses, and whether their need of relief is permanent or caused by a temporary condition.

It is equally true that the second of these consequences does not justify taxation of those who do not have occasion to buy coal, for the benefit of those who do. The use of the money of taxpayers for such a purpose would not be a public use, but a use for the special pecuniary benefit of those who happen to be affected by the state of the coal market.

The third possibility, that of an absolute famine in fuel because of the lack of a supply and the impossibility of obtaining a sufficient quantity reasonably to satisfy the needs of the community, would be a condition which would warrant the expenditure of the public money under appropriate legislation, if the legislature could discover a way through public agencies to supply the people. But it is difficult to see how the method referred to in the question could produce this result. If at any time there was an impossibility of obtaining supplies because the supplies were not here and could not be bought elsewhere, the opening of a city coal yard would furnish no relief. Such an establishment could not work a miracle of creation.

In reference to an anticipated possible famine the procurement and storage of a supply in time of plenty might be a remedy or an alleviation if the dread anticipation should become a reality, but the maintenance of a city fuel yard to conduct the business of buying and selling in a time of plenty, would have no tendency to avert a famine, or to relieve from its consequences if one should come. We are not called upon to consider whether the legislature would deem it advisable, if it has the power, to authorize cities and towns to build storehouses, in which to keep large quantities of fuel in anticipation of a possible famine.

In regard to the fourth of the possible consequences, a condition in which the supply of fuel would be so small, and the difficulty of obtaining it so great, that persons desiring to purchase it would be unable to supply themselves through private enterprise, it is conceivable that agencies of government might be able to obtain fuel when citizens generally could not. Under such circumstances we are of opinion that the government might constitute itself an agent for the relief of the community, and that money expended for the purpose would be expended for a public use.

We do not think that we are expected to determine whether there might be any other conceivable emergency which would call for an affirmative answer to this question. Considering the question only in reference to the accompanying bills and the conditions to which we suppose it relates, our answer is in the negative, except in reference to the fourth of the above-mentioned possible consequences. As to that, we are of opinion that if the supposed conditions exist in any city or town, it may be authorized, under proper legislation, to sell fuel with the limitations above stated, so long as these conditions continue.

Key 272

IRVINE, C., IN CHRISTENSEN v. CITY OF FREMONT

45 Neb. at 164. 1895

WE have no hesitation in declaring that the power to provide for and regulate the lighting of streets and the erection of lamp-posts fairly implies the power to erect gas works or an electric light plant to be used by the city for the purpose of lighting the streets. *State v. City of Hiawatha*, 53 Kan. 477; *City of Crawfordsville v. Braden*, 130 Ind. 149; *Mauldin v. City Council of Greenville*, 33 S. Car. 1. On the same principle, it has been held that a grant of power to establish and regulate markets implies the power to purchase and to hold land for the purpose of a market. *Ketchum v. City of Buffalo*, 14 N. Y. 356. And the simplest and most obvious application of the principle is perhaps found in the apparently self-evident proposition, that a grant of power to prevent and suppress fires and to raise money for supporting the fire department implies the power to purchase engines and apparatus. *Green v. City of Cape May*, 41 N. J. Law 45. Our attention is called to the case of *Spaulding v. Peabody*, 153 Mass. 129, holding that under somewhat similar grants of power a city may not erect and maintain works for the manufacture and distribution of electric light for lighting the streets. But this case is based to a large extent on a consideration of peculiar Massachusetts statutes and a narrow construction theretofore placed upon them by the court. The case is opposed to an otherwise practically uniform array of authorities. The reasoning on the general question is far from satisfactory, and while it is still a recent case, it has encountered already considerable adverse criticism. It is by no means so clear that from the power to provide for the lighting of streets any power is implied to maintain a plant for the purpose of furnishing light for private buildings. It has been said that under an express power to erect gas works or water works the uniform rule is that a city is not limited to furnishing gas or water for use in public places, but may furnish the same for private use. *Thomson-Houston Electric Co. v. City of Newton*, 42 Fed. Rep. 723. But a power in express terms to erect a lighting plant for the city and a power merely to provide for lighting the streets are very different in their effect. The former power might imply a right to maintain the plant for all purposes for which such plants are generally used, while the latter grant might reasonably be restricted to its terms.

In the *City of Crawfordsville v. Braden*, 130 Ind. 149, it was held that in the absence of any express power a municipality has the inherent power to light its streets, and to determine the means to be adopted for that purpose, extending to the construction and maintenance of works therefor. Having gone so far, the court proceeds to hold that having the power for that purpose, the city may also maintain works

to furnish light for private buildings. The reasoning resorted to in support of the last conclusion is far from convincing. The Court says that to light residences and places of business of the inhabitants is a legitimate exercise of the "police power." Elsewhere, in the opinion, the police power is referred to as a term "difficult to precisely define or limit." If the view of the Indiana court is to prevail, it might better be said that it is a term without definition or limitation. The result of some of the cases relating to the police power arouses the suspicion that courts have sometimes been disposed to seek in this term an excuse for sustaining acts seemingly conducive to the general welfare where no satisfactory legal reason for such action can be found. We think the case under discussion illustrates the danger of seeking that refuge. The court finds that the police power is involved in lighting houses from the fact that an incandescent electric light is safer to property and more conducive to health than the ordinary light. The argument is, in brief, thus: A municipality possesses inherently the police power. The police power exists for purposes of public health and safety. The incandescent electric light is safer and more wholesome than other lights. Therefore, without any grant of power in the premises, a city may maintain electric light works for the purpose of selling light to its inhabitants for use in their business houses and residences. No further comment on this case seems necessary.

In *Mauldin v. City Council of Greenville*, 33 S. Car. 1, it was held that a general grant of power to hold property, and to establish ordinances respecting the streets, for the security and convenience of the city, for preserving life and property therein, and for securing the peace and good government of the same, conferred express power to purchase and implied power to maintain an electric light plant for lighting the streets and public buildings, but not for furnishing light to private residences and places of business. . . .

Other recent authorities to which our attention has been directed throw little light on the precise question we are now considering. Thus, in *Metcalf v. City of Seattle*, 1 Wash. 297, no question of power was involved. The only question was the construction of a statute limiting indebtedness and as to the number of voters required on a proposition submitted. The case of *Thomson-Houston Electric Co. v. City of Newton*, 42 Fed. Rep. 723, construes an Iowa statute granting power to establish and maintain electric light plants as extending to the furnishing of light to the inhabitants; and the case of *Smith v. City of Nashville*, 88 Tenn. 464, holds that a power to provide the city with water-works implies a power to furnish water to the inhabitants for private use.

Following the rule stated by Judge Dillon, it is quite clear that a power to provide for and regulate the lighting of streets does not expressly authorize the maintenance of a plant to light private buildings for pay. It is equally clear that the exercise of such a power is not

tax for a private purpose 29 Pol. Sec. 185-213 June 14

indispensable to the fulfillment of the purposes of the corporation. Nor can we say that such a power is implied in, or incident to, the express power to provide for lighting the streets. We are constrained to agree with the Supreme Court of South Carolina, that while the power to light the streets authorizes the erection and maintenance of a plant for lighting the streets, it does not authorize one for supplying light to private buildings.

... power for lighting streets is to be exercised by contract & not by a tax for private buildings. Annot. 9 Cal. 119, 1197 580

*... water rents, other charges
... established, equal to public utility
... least*

SILKMAN v. THE BOARD OF WATER COMMISSIONERS
OF THE CITY OF YONKERS

152 N. Y. 327. 1897

APPEAL from a judgment of the General Term of the Supreme Court which affirmed a judgment in favor of defendant entered upon a decision of the court dismissing the complaint upon the merits on trial at Special Term.

MARTIN, J. The defendant is a corporation organized by and in pursuance of chapter 36 of the Laws of 1873. The purpose of that act was to provide a supply of water to the city of Yonkers and its residents. The act, after providing for the acquisition of the necessary lands and the construction of a plant for that purpose, authorized the board of water commissioners to establish a scale of rents to be charged to persons using the water, or to property where such water was used, to be apportioned to the different lots or parcels of land in front of or near which water pipes were laid, having reference to their dimensions, values, exposure to fire, ordinary or extraordinary uses, or consumption of water, as near as was practicable, and from time to time to modify, amend, increase, or diminish such rents. The act also provided that, in case the water rents should prove insufficient to pay the current expenses of maintaining and supporting the water-works and the interest on the bonded debt authorized by the act, the amount of the deficiency should be assessed and become a lien upon the real property in front of and near which the water pipes were laid within the district to be supplied by water, the boundaries of which were to be fixed by the common council in the manner prescribed, such assessments to be made and collected upon a separate assessment roll and by a separate warrant.

Thus, by the statute, the expenses of constructing and maintaining water-works in the city and paying the interest upon the bonds issued for their construction, were to be paid by rents which were charged for the use of water, if sufficient for that purpose. If insufficient, then a tax was to be levied to pay any deficiency that might exist. In pur-

suance of the provisions of this act, the defendant established a scale of rents to be charged to persons using the water, which, so far as applicable to the question in this case, was governed by the quantity of water consumed, the rate being reduced in proportion to the increase of the quantity taken.

The plaintiff was the owner of premises, in the city of Yonkers, known as numbers 58 and 60 Hudson Street, upon which city water was used and charged to the plaintiff according to the scale of rents established by the board. When presented, the plaintiff objected to the amount of the bills for water rents, and the defendant then threatened to cut off the water supplied to his buildings unless the rents were paid, whereupon the plaintiff paid them under protest. This action was brought to restrain the defendant from shutting off the water, and to recover certain of the rents so paid upon the ground that they were illegal.

The first contention of the plaintiff is that the water rents authorized by this act and imposed by the defendant were taxes, and could not be established without giving the individual against whom they were charged a reasonable notice and opportunity to be heard as to their propriety and equality.

Hence, the first and, practically, the only important question is, whether the water rents established by the defendant under the provisions of this act were so far in the nature of taxes as to entitle the parties liable therefor to a notice and an opportunity to be heard before they were established. It is, perhaps, true that the legislature might have authorized the payment of the cost and expenses of constructing and maintaining the water-works by taxation alone, when the plaintiff would have been entitled to the notice and hearing contended for. But, in this case, instead of doing that, it provided for the payment of a great portion of such expenses from a fund to be obtained by charging water rents to the persons by whom the water was used.

That there is a clear distinction between rents paid for water actually furnished by a corporation and used by an individual, and the payment of a sum in the nature of a tax for an anticipated benefit arising from the presence of water in the city, we have no doubt. Where an assessment for water is made upon a vacant lot, no use being made of the water by the person assessed, it may be that a sum thus assessed for a supposed benefit arising from the presence or public use of the water as distinguished from its private use by the individual, is in the nature of a tax, and that in such cases notice and an opportunity to be heard are essential to the validity of the tax. *Remsen v. Wheeler*, 105 N. Y. 573; *Matter of Trustees of Union College*, 129 N. Y. 308. If so, that principle has no application here.

While it is not denied that as to the portion of the expense of constructing and maintaining the water-works by the defendant which was raised by taxation, the plaintiff was entitled to notice and an

opportunity to be heard before any tax was levied upon his property, still, it cannot be properly said that rents which are charged for water actually used are, in any just sense, taxes, so that persons against whom they are charged are entitled to notice and an opportunity to be heard before they are established. *Treadwell v. Van Schaick*, 30 Barb. 444; *Hill v. Thompson*, 18 J. & S. 165; *Reid v. Mayor, etc.*, 56 Hun, 156; *Vreeland v. O'Neil*, 36 N. J. Eq. 399, s. c., 37 N. J. Eq. 574; *Provident Institution v. Jersey City*, 113 U. S. 506, 514.

The authorities cited in effect hold that rents, which are charged for water actually used, are valid, although the rates are established without notice or opportunity to be heard by the person paying them. This is upon the ground of an implied contract between the parties, it being said that as the rates are known to persons applying for a supply of water, when the application is made, it is in effect an assent by the applicant to those terms, and constitutes a contract between the parties.

Moreover, in this case, in the application made by the plaintiff, he asked to be supplied with water under the rates and subject to the rules, regulations, and ordinances of the board of water commissioners. It was by virtue of these rules that the rate charged had been established, and, hence, this application must be regarded as an express consent upon his part to pay the rates charged. We are of the opinion that, under these circumstances, the water rents charged the plaintiff were not in the nature of taxes, but were rents established for water actually used and supplied to him under an express contract that he would pay for it at the rates established by the defendant, and, therefore, he is not entitled to either enjoin the defendant from collecting them, or to recover any portion of them paid under protest.

The claim of the plaintiff, that the rents established by the defendant were not authorized by the act incorporating it, cannot be sustained. In broad terms, the act conferred upon the defendant the power to establish a scale of rents to be charged and paid for the use and supply of water, having reference to matters referred to in the statute, among which was the consumption of water. The objection made here is that the persons who consumed large quantities of water were not charged as much per hundred cubic feet as those who consumed a less amount. Under this statute the question of consumption was one of the elements to be considered in determining the rates. Surely, it cannot be said to be unreasonable to provide less rates where a large amount of water is used than where a small quantity is consumed. That principle is usually present in all contracts or established rents of that character. It will be found in contracts and charges relating to electric lights, gas, private water companies, and the like, and is a business principle of general application. We find in the rates as they were established nothing unreasonable, or that would in any way justify a court in interfering with them.

Judgment affirmed.

Water 203(1) Right to charge
(3) uniform
 CITY OF CHICAGO v. NORTHWESTERN MUTUAL LIFE
 INSURANCE CO.*

218 Ill. 40. 1905

ASSUMPSIT against the city to recover back certain water charges paid by the plaintiff under protest. On an agreed statement of facts judgment was rendered for the plaintiff. The city appeals.

The water rates concerned were charges against the owners or tenants of certain real estate for water furnished to them upon the property. The plaintiff had subsequently become the owner of said property by the foreclosure of mortgages thereon; it paid the charges because of the threat of the city to shut off the supply from the premises, under a city ordinance which provides that if a water rate is not paid within sixty days after the first day of the current assessment period the water shall be shut off from the premises.

William D. Barge (*Edgar Bronson Tolman*, Corporation Counsel, of counsel), for appellant.

Hoyne, O'Connor & Hoyne, for appellee.

MR. JUSTICE WILKIN. The sole question is as to the right of appellee to recover the sum thus paid under protest. It is not claimed that the city had any lien on the lots for the back taxes or that appellee was under any obligation to pay the same, but it is claimed by appellant that the city had a right to say that it would not furnish a future supply of water unless its old bills were paid, and that the payments were made by appellee with full knowledge of all the facts, and were therefore voluntary and not under protest, and cannot be recovered.

Appellant is a municipal corporation. Its corporate powers do not require it to furnish water to its inhabitants, but it has the right so to do when it sees fit. But when it does thus furnish its inhabitants with water, it is not by virtue of the exercise of the power of sovereignty, but it is a business which is public in its nature, and belongs to that class of occupations or enterprises upon which public interest is impressed. The water rates are imposed and collected, not as a tax, but as a compensation to be paid by those who choose to receive and use the water. The city cannot arbitrarily establish its rates, but they must be, to a certain extent, uniform, reasonable, and just. Neither can the city arbitrarily select its patrons, but it must serve all who may apply on equal terms. *Wagner v. City of Rock Island*, 146 Ill. 139. Appellee became the owner of the pieces of property at various times, covering a period of several years. Under the law it had a right to be treated the same as other residents of the city. When payment was demanded for back taxes [rates], it offered to pay what other inhabitants of the city paid for like services but refused to pay the rate in arrears. Demand was made for the whole amount and a part payment would

not be accepted. Appellant and appellee did not stand upon the same footing, as appellant had the power and means to deprive appellee of its water supply, and had threatened to exercise this power, and had in some instances actually shut off the water. The various pieces of property were occupied as residences and stores, which required water, and to shut the water off from them would entail great damage to appellee, as it had no other means of supplying them. The bills were not contracted by appellee, and it was under no more obligation to pay them than it was to pay any other bills of any other person. The back tax [rate] was not a lien upon the premises, and appellee had in no way, as required by law, promised to pay the same. . . .

See 2 Rev. of P. S. Co. Nymau 456 Judgment affirmed.

Key MC. 285-
680

CITY OF QUINCY v. BULL *et al.*†

106 Ill. 337. 1883

BILL in chancery to enjoin the city and its officers from interfering with the laying of water pipes by the complainants in streets of the city. A demurrer was overruled and an injunction granted. Appeal by the defendants.

According to the bill, in 1873 the city council by ordinance granted one Prince the exclusive right to construct, maintain, and operate water-works in the city for thirty years, and to sell water for municipal and private use, with the right of way in all streets and alleys for the laying of mains and services. Prince was required to construct water-works within a certain time, and to extend mains when ordered by the council; and the city was required to pay a certain rate per year for each fire hydrant. The ordinance specified that upon acceptance it should constitute a contract. Prince accepted the ordinance, and has complied with it; his co-complainants claim as assignees of parts of his interest.

In March, 1881, the council passed an ordinance repealing that of 1873, and later passed ordinances restricting digging in and obstructing the streets, under which ordinances the city officers are now interfering with complainants.

Messrs. Sibley, Carter & Covert, for the appellant.

Messrs. Marsh & McFadon, for the appellees.

MR. JUSTICE SHELDON. . . . [The court held that the question whether the grant to Prince could be made *exclusive* was not involved in this suit.] The simple question involved here is, whether complainants, under the ordinance, have the right of way in the streets for the purpose of laying water pipes under the surface, to supply the city and in-

285 P to grant franchise in city

680-681 P to St & grant franchise in city

690 Revocation of franchise

habitants of Quincy with water, and for the purpose of repairing their pipes laid.

The ordinance of August 7, 1873, and the acceptance of it by Prince, constituted a contract between him and the city of Quincy, by which there was granted the right of way which is claimed. The power of the city to make such a grant seems quite clear. It may be derived from the exclusive control of its streets given to the city by its charter, section 33 of which is as follows: "The city council shall have exclusive power over the streets and alleys, and may abate any and all obstructions and encroachments therein in such manner as may be provided by ordinance." (Private Laws 1857, p. 170.) In this State there is vested in municipal corporations a fee simple title to the streets. Under the power of exclusive control over streets, it is very well settled by decisions of this court that the municipal authorities may do anything with, or allow any use of, streets, which is not incompatible with the ends for which streets are established, and that it is a legitimate use of a street to allow a railroad track to be laid down in it. *Moses v. Pittsburg, Fort Wayne, and Chicago R. R. Co.*, 21 Ill. 522; *Murphy v. Chicago*, 29 id. 279; *Chicago and Northwestern Ry. Co. v. Elgin*, 91 id. 251. The laying of water pipes under ground would be much less of an obstruction and interference with the ordinary purposes of a street than the laying and maintaining of a railroad track upon its surface.

It is the general doctrine that municipalities, under the power of exclusive control over their streets, may allow any use of them consistent with the public objects for which they are held, and that uses for the purpose of sewers, gas pipes, and water pipes are among those for which the use of streets may be granted. 2 *Dill., Mun. Corp.* (2d ed.) §§ 544, 551, and authorities there cited.¹

¹ As to whether a municipal corporation can grant a street franchise under a general authority to regulate and control the streets, there has been a difference in views. The statutory systems of the various States are also so diversified that there is very little general law on the point. The following quotations may, however, be considered:

"In asserting that the grant of authority to lay tracks upon the public streets of a city must be expressly conferred, the counsel limit the rule more rigidly than the authorities warrant. Such an authority must, it is true, be conferred by statute, but it is not indispensably essential that the grant should be stated in express words. If it is conferred by necessary implication, it will be upheld and enforced. But the grant must be conferred, either by express words or be necessarily implied. Without such a grant the public streets cannot be used by a railway corporation for the transportation of passengers for hire. The right to so use the streets is a franchise, and such a franchise as can only exist by force of a legislative grant. . . .

"The ordinary and incidental powers of a municipal corporation are not broad enough to include the power to grant to a railway company the right to lay tracks and conduct the business of transporting passengers upon and over the streets of the municipality. Such a power is an extraordinary one, and one which cannot be implied from a charter of a municipal corporation which confers only the usual powers ordinarily bestowed upon such corporations. We are speaking now, not of the intersection and crossing of streets by railway tracks, laid down in building lines of road which run through the city, but of railways exclusively doing business in the city occupying the streets for that purpose." *Eichels v. Evansville Street Railway Co.*, 73 Ind. 261.

"The usual extensive powers conferred upon municipal corporations to improve and control streets and regulate their use, will, if there are no provisions showing a different legislative intent, it is believed, ordinarily authorize them to use or permit

* 2900, # 2900, # 29-1234, 12 Const. Art. I § 19

By section 22 of its charter the city is further empowered "to provide the city with water, to erect hydrants and pumps in the street for the convenience of the inhabitants." Private Laws 1857, p. 181. By implication from this express power to supply the city with water, the power to grant the use of the streets, as was done in the ordinance of August 7, 1873, existed in the city council of Quincy.

In 2 *Dill., Mun. Corp.* (2d ed.) § 551 it is laid down: "The use of streets for the purpose of laying down water pipes, stands upon the same principle as their use for sewers and gas pipes. Where the charter gives to the city, in terms, the power to supply, or authorize the inhabitants to be supplied with, water, the municipal council may use, or as an incidental power may permit the contractor to use, the streets for this purpose, and the adjoining feeholder is not entitled to compensation as for a new servitude, for it is not such, but only a proper or necessary use incident to a street in a populous place. And see, *State ex rel. v. Cincinnati Gas Co.*, 18 Ohio St. 295; *Indianapolis v. Gas Light Co.*, 66 Ind. 396; *Des Moines Gas Co. v. Des Moines*, 44 Ia. 508.

Under this power to provide the city with water, then, the city might have erected its own water-works and supplied itself with water, or it might have contracted with some one else to construct the water-works and furnish the supply of water to the city. The city council saw fit to adopt the latter course, and accordingly, by the ordinance in question, made a contract with Prince that he should construct the water-works, and at his own expense, and furnish the city with water. The use of the streets for the purpose of laying the waterpipes may be regarded as indispensable for the construction of the water-works, so that the power to contract for their construction included, as a necessary incident, the power to contract for the use of the streets for the purpose.

We thus find that there was full power in the city council to contract with Prince for the construction of these water-works, and for his use of the streets for that purpose. This privilege of the use of the streets by Prince is not a mere license revocable at the pleasure of the city council, but it is a grant under an express contract, for an adequate consideration received, and binding as such.

The position taken by appellant in opposition to the binding force of the ordinance, as it respects the use of streets, is, that the city, in the passage of the ordinance, was acting in its public, not its private, character, and that the act was a legislative or governmental act, in the

the use, in the usual manner, under municipal regulation, of a reasonable portion of the street for horse railways, provided they do not surrender or abdicate their legislative and police powers and functions with respect to the streets and the persons or corporations thus licensed to use them. The legislature may authorize the municipalities to give or withhold an absolute assent to such a use of their streets, or it may leave them free to annex conditions, or it may itself require certain conditions to be met before the grant shall be made by the municipal authorities." 2 *Dill., Mun. Corp.* (5th ed.) § 1239.

In *State v. Mayor, etc., of Newark*, 49 N. J. L. 344, it was held that a city could not consent to the use of the streets by a telephone company, under a general power to "regulate streets."

exercise of the city's legislative power of control over the use of its streets, which power of control was incapable of being abridged, but must be left free, to be exercised unrestrictedly from time to time, as the city council may see fit; and the case is put as if it were a diversion of the use of the streets from the purpose for which they were dedicated, and the permitting an obstruction in them by an individual for his private use. As we have seen, this was no diversion of the use of the streets from their proper purpose, but a use of them consistent with such purpose. It was not for a mere private object, but for the public benefit of the city, in supplying it with water. We do not perceive how the doctrine as to the legislative governmental powers of a municipality can be brought in and have any bearing upon the facts of this case.¹ See *DeVoss v. City of Richmond*, 18 Gratt. 338; 1 *Potter on Corp'ns*, §§ 376, 395.

We have found that the city council had power to make this contract for the use of the streets; that it had power to contract for the putting in of the water-works; that they could not be constructed without the use of the streets for the purpose, — and therefore, the power to contract for the water-works included, as a necessary incident, the power to contract for the use of the streets for that purpose. The power to make a contract, but not to make a binding one, is unmeaning. Where there is power to make a contract, there is power to make one that shall bind. We see no more to be involved here than the simple law of contract, — whether a municipal corporation may at its will repudiate the obligation of a fair contract which it has made, and which it was authorized to make. The attempt is to take back a grant which the city has made under a contract. The State itself may not revoke a grant it has made. The city must be bound by the contract and grant it has made, and had authority to make, the same as would an individual. 1 *Potter on Corp'ns*, § 376; *City of Burlington v. Burlington Street Ry. Co.*, 49 Ia. 144. . . .

Judgment affirmed.

STATE, THE HUDSON TELEPHONE COMPANY, PROSECUTOR, *v.* MAYOR AND ALDERMEN OF JERSEY CITY *

49 N. J. L. (*Supreme Ct.*) 303. 1887

CERTIORARI to review an ordinance. The ordinance brought up purports to repeal an ordinance passed in 1884 which gave the prosecutor permission to establish its line in certain streets. The grant was on condition that no post should be erected in front of any building so as to interfere with the approach to the entrance of said building, nor

¹ See Chapter VI.

without the permission of the property owner; that the company should conform to provisions of an ordinance concerning telegraph poles in the public street; that they should not interfere with gas, water, or sewer pipes; and that before they commenced to excavate for the purpose of laying cable they should give a bond conditioned that the company should comply with all the conditions named in the ordinance, and save the city harmless from such acts as might injure third persons.

The prosecutor was organized under "An act to Incorporate and Regulate Telegraph Companies," contained in Rev., p. 1174 (and supplement) found in Pamph. L., 1881, p. 201, which provides that any telegraph company organized thereunder shall have power to use the public roads or highways for their lines, but not without first obtaining from the incorporated city or town a designation of the streets in which the same shall be placed and of the manner of placing the same. Under the ordinance of 1884, the company had complied with the conditions specified, and had erected part of their line in the streets, when the repealing ordinance was passed.

For the plaintiffs, *Vredenburg & Garretson*.

For the defendants, *R. B. Seymour*.

REED, J. . . . I am of the opinion that as a general rule a designation of streets by a city gives the company an irrevocable right to use the streets so designated for the purposes indicated in the statute. Certainly, after the expenditure of money in the erection of poles, made in reliance upon the municipal designation, the company obtains a vested right of which they cannot be stripped by a subsequent revocation of such designation.

The notion that a corporation which, under provisions similar to the present act, has, upon the strength of a permission to use a certain route, spent thousands of dollars in laying railway tracks or subterranean cables, or in erecting posts and stretching wires, is at the mercy of the city authorities continually and entirely, is not to be entertained for a moment.

A view that the rights of the corporation are of so unsubstantial a character is opposed to all judicial sentiment, from the Dartmouth College case to the present time. *State, Britton, pros., v. Blake*, 6 Vroom, 208, and cases cited on page 215.

The power to repeal, suspend, and alter charters contained in section 6 of the act concerning corporations (Rev., p. 173), does not reach the exercise of the authority attempted by the common council. No provision is contained in the act under which the prosecutors were incorporated which confers upon a municipality the power to revoke a permission once granted. The grant of the franchise to this company was subject only to a repeal or alteration by the legislature, and when that corporation had acquired vested rights in the mode designated by their charter, it certainly was not in the power of a common council to strip them of any right so acquired.

It was undoubtedly competent for the common council to couple with the permission such reasonable conditions as the occupancy of a public street by a telephone company's posts and wires would suggest. And without such conditions the erection and maintenance of appliances of the business of the company would be subject to the reasonable control of municipal by-laws. *Dill., Mun. Corp.* §§ 555, 558, 575.

But that the common council has the power, at its mere will, to annul the act which has legalized the occupation of the streets, and so leave the company's property impressed with the character of a nuisance, which can be at once abated and their business thus destroyed, I cannot admit.

The power of a common council to revoke its permission, given by statutory authority, to the location of a railroad in the streets of a city was expressly denied in the case of the *People's Passenger Railway Co. v. Baldwin*, reported in 37 Leg. Int. 424, and in the case of the *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 Barb. 368.

I also understand the rule laid down in *Commonwealth v. Boston*, 97 Mass. 555, in reference to the right of municipal authorities to proceed against telegraph poles in a street as nuisances, after permission to so place them has once been granted, is in the same direction.

It is noticeable that there was no failure, in the present case, by the company to perform any required condition precedent to their occupation of the streets. The bond which they were to give was only to protect the city in case the company should excavate and lay cable wires, which, if they could, under their charter, do it all, they have not done. ✓ There is no pretension that they failed in any other particular to conform to the requirements embodied in the ordinance conferring the permission.

The power to repeal the present ordinance is also claimed to exist under the authority over streets as well as the power to repeal ordinances conferred upon the common council of Jersey City by its charter. But it is clear that the power to remove obstructions from streets is confined to nuisances, and any object which has a legal right in the street is beyond the power of the common council. So long as the company violate no reasonable regulation of the common council, their property has as much right in the streets as vehicles and street cars.

And in respect to the power to repeal ordinances, it is a general power which exists outside of the express powers conferred by charter, by reason of the right to pass ordinances. This general power cannot be invoked to sustain the rescission of an act done by virtue of other legislation, which act is, by reason of the object, the latter legislation, or the acquisition of vested rights, an exception to the general rule which permits legislative bodies to rescind resolutions or repeal laws.

We have determined that this act of giving permission (which, by the bye, could have been conferred by resolution as well as by ordinance) was one which, at least after acceptance and expenditure of money

under it, was irrevocable. It was therefore removed from the operation of the general rule. . . .

I am of the opinion that the ordinance brought up should be adjudged illegal. Let it be set aside.

BOERTH v. DETROIT CITY GAS CO.†

152 Mich. 654. 1908

BILL to enjoin defendant from disconnecting the supply of gas from complainant's premises for refusing to pay a charge of 80 cents per thousand cubic feet for fuel gas. The trial court rejected evidence offered by the complainant that the rate charged was unreasonable, and held that the city of Detroit had made a valid contract with defendant which permitted it to charge that rate. A city ordinance of 1898 granted defendant for thirty years the right to lay gas pipes in the streets; and provided, "The said company shall not charge nor receive a higher rate than 90 cents per thousand cubic feet for manufactured gas sold to consumers for fuel purposes from illuminating mains within the city limits, and each and every consumer shall be entitled to a discount of ten cents per thousand cubic feet upon " prompt payment.

Complainant appeals from a decree dismissing the bill.

Alex. J. Broesbeck and Guy A. Miller, for complainant.

Angell, Boynton, McMillan & Bodman (Brenan, Donnelly & Van De Mark, of counsel), for defendant.

CARPENTER, J. Did the city of Detroit have authority to grant defendant the right to charge 80 cents per thousand cubic feet for fuel gas delivered to consumers within said city? The charter of the city of Detroit confers upon it this power:

"To control, prescribe and regulate the manner in which the highways, streets, avenues, lanes, alleys and public grounds and spaces within said city shall be used and enjoyed. . . . To provide for and regulate the lighting of said avenues, streets and public places." Detroit Charter (1904), ch. 7, § 34.

The act for the organization of gas-light companies — under which act defendant is incorporated — contains the following provision (section 7123, 2 Comp. Laws):

"Any corporation formed under this act . . . shall have full power to manufacture . . . and sell . . . gas . . . and shall have power to lay conductors for conducting gas . . . through the streets, lanes, or squares of any city, town or village where said corporation is located, or carrying on its business, . . . which pipes or conductors shall be laid with the consent of the municipal authorities of such cities, town-

ships or villages through which the same are laid, under such reasonable regulations as they may prescribe."

There is given by this language to the city of Detroit very broad powers. Without its consent a gas company cannot lay its pipes in the streets, and without so laying them it cannot furnish gas to the inhabitants of the municipality. The city may refuse to grant that consent. It is clear, too, that it may attach conditions to its consent. What conditions? May it prescribe the rates at which gas shall be furnished to its inhabitants? The statute does not say in express terms that it can. Is it forbidden? It certainly is not forbidden in express terms. The only language in the statute limiting the authority of the municipality is to be found in the language authorizing the municipality to prescribe reasonable regulations for the laying of the pipe. Without undertaking to definitely determine what is meant by reasonable regulations, it is quite clear that nothing but unreasonable regulations are prohibited. Authority to prescribe rates then is not prohibited unless that authority may be properly denominated unreasonable. Is it unreasonable? There is no doubt that the municipality may determine for what length of time a gas company may use its streets for conveying gas. It had, therefore, authority — an authority exercised in this case — to determine that the gas company should use the streets for a period of thirty years, for the purpose of supplying its inhabitants with gas. Is it unreasonable for the city to prescribe the rates at which gas shall be furnished to its inhabitants? If the city cannot prescribe those rates, consumers of gas must pay whatever price the gas company asks or resort to litigation, and pay what is there determined to be reasonable. Few consumers will resort to litigation. . . . It may be said, then, that in order to safeguard the rights of its inhabitants who use gas, it is not only not unreasonable that the city should have the power to fix rates, but it is highly expedient — indeed, it is necessary — that it should possess that power. It is therefore quite clear that there is nothing in the statute which either in express terms or by proper construction prohibits the city prescribing rates at which gas shall be furnished to its inhabitants.

In this respect the case at bar differs materially from *Freeport Water Co. v. City of Freeport*, 180 U. S. 587, a case relied upon by complainant. In that case it was held by a divided court that the authority of the municipality to enter into a contract which prescribed water rates was limited by express statutory enactment. There is no such limitation in this case.

It has already been stated that the statute does not give the city express authority to prescribe rates. Can that authority be implied? Does it pass as an incident to the authority to attach conditions to its consent that pipes may be laid in the streets? This raises the most important question in this case. Complainant contends that the power of a municipality to prescribe rates cannot rest in implication; that a

municipality has not that power unless it is expressly granted. In support of this contention are cited many cases (*Interstate Commerce Commission v. Railway Co.*, 167 U. S. 479, is the most important of these cases) relating to a grant of the legislative power of determining rates. The principle underlying these authorities is that there is a strong presumption against the grant of legislative authority. That principle and the authorities applying it have no application here. It is not contended that the city of Detroit has the legislative power of determining rates. That would be the power of regulating these rates according to its own wisdom from time to time precisely as the legislature regulates the rates of railroads. Complainant agrees with defendant that the city possesses no such power. The power to prescribe rates by contract — and that is the power which was exercised in this case — is a very different power from the legislative power of regulating rates. Says the Supreme Court of Indiana in *City of Indianapolis v. Gas-Light & Coke Co.*, 66 Ind. 396:

"This power to legislate within the authority delegated to them by law is distinct from the power to contract although exercised by the same corporation. They cannot, by contract, delegate or restrict their legislative power, nor can they merely by their legislative power, make a contract. These two powers need not be confounded. The exercise of the legislative power requires the consent of no person except those who legislate; while it is impossible to make a contract without the consent of another, or others. We think, therefore, that, when the city of Indianapolis made the contract in question with the Gas-Light Company (a contract like that involved in this case) it made it in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract was authorized by an ordinance; and, having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise."

Says the United States Circuit Court of Appeals, eighth circuit, in *Illinois Trust & Savings Bank v. Arkansas City*, 76 Fed. 271:

"A city has two classes of powers, — the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, *quasi* private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise

it is to be governed by the same rules that govern a private individual or corporation. . . . In contracting for water-works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and its denizens."

See, also, *Omaha Water Co. v. City of Omaha*, 147 Fed. 1; *Muncie Natural Gas Co. v. City of Muncie*, 160 Ind. 97 (60 L. R. A. 822); *Zanesville v. Gas-Light Co.*, 47 Ohio St. 1.

Complainant invokes the authority of those cases (see *Detroit Citizens' St.-Ry. Co. v. City of Detroit*, 110 Mich. 384 (171 U. S. 48) which hold that the power to grant exclusive rights will not be implied from general language, but must be clearly and explicitly expressed. Nothing can better show the inapplicability of these decisions than by quoting the concluding language of the opinion rendered by the Supreme Court of the United States. It reads as follows:

"Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them." . . .

The first case to receive attention is *Mahan v. Telephone Co.*, *supra* [132 Mich. 242]. There the city of Detroit possessing, not the authority to exclude telephone companies from the use of its streets, but possessing only the authority to establish reasonable rules and regulations, enacted an ordinance fixing the maximum rate of telephonic charges. The telephone company accepted this ordinance. The successor of this telephone company declined to observe the terms of this ordinance. It denied the right of the city to fix rates. This contention was overruled, and it was said "the right of the city to make the contract in the premises cannot be questioned."

In *Muncie Natural Gas Co. v. City of Muncie*, 160 Ind. 97, it was held that the grant of an exclusive power over the streets, highways, and alleys gave to the municipality authority to enter into a contract with the gas company prescribing the rates which should be charged. The court saying:

"The grant of exclusive power to the common council over such ways comprehends the right to permit gas companies to use the streets. If the common council may permit a natural gas company to use the streets without any conditions annexed, except such as the law attaches, it is not perceived why, as in this case, in making provision for supplying natural gas to all of the inhabitants of the city, it may not protect such inhabitants against extortion by providing that the company shall not charge in excess of certain prices for its service. The right to annex

terms by way of limitation upon the authority of the grantee in such cases has been often affirmed by this court."

Under a provision that a street railway shall not be constructed until the council "by ordinance shall have granted permission and prescribed the terms and conditions" it was held that the city might enter into a contract prescribing the rates of fare. *City of Cleveland v. Railway Co.*, 194 U. S. 517. [Citations omitted.]

We consider therefore that the city of Detroit did have authority to enter into the contract prescribing the rate which defendant should charge the inhabitants of the city of Detroit.

Did the city of Detroit enter into such a contract? Did it grant to defendant the right to charge 80 cents per thousand cubic feet for gas used for fuel? That depends upon the proper construction of the following language:

"The said company (defendant) shall not charge nor receive a higher rate than 90 cents per thousand cubic feet for manufactured gas sold to consumers for fuel purposes from illuminating mains within the city limits, and each and every consumer shall be entitled to a discount of ten cents per thousand cubic feet upon" prompt payment.

Complainant argues that this language is a limitation upon the right of the company to charge and not a grant. This precise question was involved in *City of Detroit v. Railway Co.*, 184 U. S. 368. There an ordinance provided "that the rate of fare shall not exceed five cents on any one car." The court said:

"Nor does the language of the ordinance, which provides that the rate of fare for one passenger shall not be more than five cents, give any right to the city to reduce it below the rate of five cents established by the company. It is a contract which gives the company the right to charge a rate of fare up to the sum of five cents for a single passenger, and leaves no power with the city to reduce it without the consent of the company."

See, also, *City of Cleveland v. Railway Co.*, *supra*.

A similar question was involved in *Pingree v. Railroad Co.*, 118 Mich. 314. There the charter of the railroad company provided that it should be lawful for said company from time to time to fix, regulate, and receive the tolls and charges to be taken for the transportation of property and persons on the road subject only to a limitation as to passengers of three cents a mile, and ten cents in addition on distances not exceeding thirty miles. It was held that this gave the company a contract right to make any charge not in excess of the amount specified, and that this right could not be abridged by subsequent legislation not authorized by the charter. In opposition to these views, complainant relies upon a line of cases of which *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 179, is an illustration, which hold that similar language to that under discussion inserted in a statute does not prevent subsequent legislation reducing the charges. Those cases are not applicable.

None of them are authorities for the proposition — and that is the proposition involved in this case — that before the enactment of such subsequent legislation, the rates prescribed in the statute could be enforced. Indeed, it is our understanding that all these cases proceed upon the theory that the prescribed rates governed until they were changed by legislation. We are therefore of the opinion that the ordinance under consideration gave defendant a right to charge 80 cents per thousand cubic feet for gas used for fuel. . . .

[Decree affirmed.]

EAST OHIO GAS CO. v. CITY OF AKRON *

81 Ohio St. 33. 1909

THE gas company was incorporated, according to its articles of incorporation, for the purpose of producing, etc., natural gas, and transporting it to specified towns and cities, including Akron. In September, 1898, by ordinance, the city consented that the company should lay its pipes in the streets, and make connections for supplying public buildings, street lamps, and private consumers. The condition was attached, among others, that for the first five years the company should charge not exceeding twenty-five cents per thousand feet of gas, and for the next five years, not exceeding thirty cents per thousand feet; and it was provided therein that, "the council of said city of Akron shall not during the period of ten years from and after the passage of this ordinance pass any ordinance fixing or attempting to fix the rates at which gas shall be supplied at any lower price than these set forth." The ordinance was entirely silent as to the length of time during which the gas company might occupy the streets and supply gas. After the expiration of ten years the council passed another ordinance fixing the price at twenty cents a thousand feet for the ensuing ten years. The company declined to accept the terms of this second ordinance and signified its intention of discontinuing its business in the city and wholly withdrawing therefrom. Whereupon the city filed its petition praying for an injunction against the company to restrain it from ceasing to furnish gas as theretofore.

After answer by the defendant, and upon hearing, the court granted the injunction; on appeal, the Circuit Court made a similar order; the company brings the case here on error.

Messrs. Kline, Tolles & Goff; Messrs. Tibbals, Frank & Ream and Messrs. Doyle & Lewis, for plaintiff in error.

Mr. Nicholas M. Greenberger, city solicitor; Mr. Jonathan Taylor,

assistant city solicitor; *Mr. C. R. Grant* and *Mr. G. M. Anderson*, for defendant in error.

DAVIS, J. This case was orally argued and submitted six months ago; but, on account of its great importance to the public as well as to all public service corporations, we have given it unusual consideration and we have reached our conclusions only after most careful deliberation.

The chief question for solution here is whether the plaintiff in error may, under the circumstances disclosed in the record, discontinue the furnishing of gas to the city of Akron and its inhabitants and take away from the streets its mains and pipes and, in short, its whole plant.

In seeking an answer to this question it will be necessary first to consider the nature of the franchise granted to the plaintiff in error by its charter and the extent of the obligation imposed upon it by its acceptance of the city ordinance under which it entered the city and served the public therein until September 26, 1908. The distinction between franchises, privileges or powers of a corporation, on the one hand, and its duties, obligations, or liabilities, on the other hand, is elementary. There are no obligations imposed upon the plaintiff in error by its charter, or by the statutes under which it was granted, except the requirement that it shall have a principal office to be located at Cleveland and that the company's main line shall commence at points on the Ohio River and run thence through certain counties to Cleveland in Cuyahoga County. These with the further obligation imposed by statute (Section 6780, Revised Statutes) that the company shall allow no lapse in the exercise of its franchise of the extent of five years, constitute all of the positive conditions, so far as we are now concerned, which are imposed upon this company. It seems to us that when to this association of persons was granted the right to be a corporation "for any purpose for which individuals may lawfully associate themselves, except for carrying on professional business" (Section 3235, Revised Statutes), the purpose is a privilege which may or may not be exercised to the full extent, just as individuals may modify their original designs to conform to circumstances. Therefore the statement in the articles of incorporation that the company is formed for the purpose of producing and furnishing gas to certain named towns and cities "and to other cities, villages and places in the counties aforesaid," does not appear to us to be so indivisible that the company must conform to this purpose in all of such cities, villages or places or in none of them. As we construe the charter along with the statutes, the privilege conferred is of producing and transporting gas to each or all of the places named or described, and if to any, then in the manner described. The remedy for non-user or mis-user of the franchise lies with the State; and the defendant in error, the city of Akron, cannot invoke that remedy. Whatever rights the city may have to maintain this action, they must arise out of its contract with

The East Ohio Gas Company; for that the ordinance passed in September, 1898, and its acceptance by the company constituted a contract will scarcely be disputed.

Whether a contract for the privilege of entering the streets of the city was necessary to the plaintiff in error or whether the defendant in error was competent to make it, is immaterial in this case. The consent of the city for that purpose was granted by the ordinance and it was accepted by the gas company; but no stipulation was made and accepted as to the time when the use of the streets for the purposes of the gas company should end. The language of the ordinance is, "That The East Ohio Gas Company, its successors and assigns, are hereby granted the right to enter upon the streets, alleys and public grounds of the city of Akron, Ohio, . . . to maintain, operate, repair and remove mains and pipes . . . together with the right to construct and maintain, repair and remove all necessary regulators," etc. Did the granting of this privilege or right and its acceptance constitute an agreement by the gas company that, having entered the city, it should remain there forever if the city should not permit it to withdraw? The logic of the defendant in error would seem to support an affirmative answer to this question. But if the company enters by virtue of the contract and can withdraw only by consent of the city, then the contract lacks mutuality; for we can discover no corresponding stipulation in favor of the company. It is true that the ordinance grants the right to enter and occupy the streets, but in respect to the time when it shall terminate its occupancy and withdraw, the ordinance is silent. May we infer from this silence that the gas company has a perpetual franchise in the streets? We are not now prepared to hold that the company has thus acquired such a perpetual franchise; and we feel quite sure that even the defendant in error, on more mature reflection, would not insist upon such a conclusion. This court laid it down as the law, in *Railroad Company v. Defiance*, 52 Ohio St. 262, 307, that: "Every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restriction of the control of the proper agencies of the municipal body over them, or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally in favor of the public, and *never extended beyond its express terms* when not indispensable to give effect to the grant." The doctrine, as well as the judgment, in this case was affirmed in *Wabash R. R. Co. v. Defiance*, 167 U. S. 88. The same rule of construction was approved and followed in *Blair v. Chicago*, 201 U. S. 400, and in *Cleveland Electric Ry. Co. v. Cleveland*, 204 U. S. 116.

It comes then to this, that in the absence of limitations as to time, the termination of the franchise is indefinite and, to preserve mutuality in the contract, the franchise can continue only so long as both parties are consenting thereto. Or, to state it concretely, the contract being

silent as to the duration of the franchise and the ten-year agreement as to the price of gas having expired, the city may, under its power of regulation, impose new conditions as to price and the gas company may accept or reject these. If the refusal to comply is final, the company necessarily incurs the penalty of forfeiture of its franchise to serve the people of the city, but on the other hand, there being no provision to that effect in the original contract, the city cannot directly or indirectly deprive the gas company of its property without due process of law, when the latter withdraws from the further exercise of its franchise. *Cleveland Electric Ry. Co. v. Cleveland*, 204 U. S. 116.

Undoubtedly the city may regulate the price of gas after the expiration of the ten-year term expressed in the contract, if the gas company continues to exercise its franchise in the city; but it may do so, not by virtue of the contract, but by virtue of the statute which empowers the city council to fix the price for a period not exceeding ten years. Having done so for a period of ten years from September 26, 1898, its power was not exhausted; but so long as the gas company continues to exercise its franchise within the city, the council may fix the price for any period not exceeding ten years, and so on until the gas company discontinues. This is in accord with the judgment of this court in *Gas Light Co. v. Zanesville*, 47 Ohio St. 35. . . .

The defendant in error seems to be insistent that inasmuch as the plaintiff in error is a corporation serving the public, it in some way becomes absolutely subject to control by the public which it serves. The answer to this claim is very well expressed by the Supreme Court of the United States, speaking through Chief Justice Waite, in *Munn v. Illinois*, 94 U. S. 113, 126: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use;* but, so long as he maintains the use, he must submit to the control." . . .

Judgment reversed and judgment for plaintiff in error.

CHAPTER VI

LIMITATIONS ON MUNICIPAL DISCRETION

1. *Unreasonable or Abusive Action*CITY OF CHICAGO *v.* BROWN *et al.*

205 Ill. 568. 1903

APPEAL from the County Court of Cook County.

Boggs, J. The County Court of Cook County entered judgment refusing to confirm a special assessment levied to pay the cost of grading, paving with asphalt, and curbing Calumet Avenue from the south line of Thirty-first Street to the north line of Thirty-third Street, in the city of Chicago, and the city has appealed.

The proposed improvement covered but a distance of two blocks and one street intersection, viz., the intersection of Thirty-second Street and Calumet Avenue. Thirty-second Street, including the intersection aforesaid, had within less than four years before been paved by the city with macadam, and the evidence, practically without contradiction, showed that the pavement at the street intersection was still in good condition. The view of the County Court was that the requirement of the ordinance that the macadam pavement laid in the intersection of Thirty-second Street and Calumet Avenue, which had been in place less than four years and was in good, serviceable condition, should at the expense of the property owners be torn up and replaced by a pavement of asphalt, was so unreasonable and oppressive as to justify the court to declare the ordinance to be void.

An ordinance adopted by a city under a grant of power from the General Assembly to legislate generally on a given subject, as was the ordinance here under consideration, if unreasonable, unjust, and oppressive, will be held invalid by the courts, and whether it is so unreasonable and unjust is a question for the decision of the court, in view of the existing circumstances and contemporaneous conditions. This rule has been frequently declared, and it is not questioned by counsel for the city. The power with which the court is vested to annul the action of the law-making body of a municipal corporation should, as is suggested by counsel for the city, be exercised only in clear and strong cases, but when such a case is presented it becomes the duty of the court to act, and protect the citizen against arbitrary

and oppressive ordinances. We agree with the County Court that the ordinance here under consideration should be regarded as inoperative. The macadam pavement of the intersection had been in place less than four years. It was in good condition and no reason for removing it appeared. To impose upon the owners of the property in these two blocks affected by the ordinance the burden of defraying the expense of tearing up and removing the macadam and of re-paving the intersection with asphalt cannot be defended against the insistence that it arbitrarily and unreasonably cast upon them unnecessary expense and operated unjustly upon them. The judgment is affirmed.

MUNDY v. BOARD OF WATER COMMISSIONERS
OF PERTH AMBOY

75 N. J. L. (Sup. Ct.) 25. 1907

ON *certiorari*.

GARRISON, J. The resolution adopted by the board of water commissioners of the city of Perth Amboy for the purchase of thirty-two and one-half acres of land at Runyon pumping station for the sum of \$15,550 should be set aside.

The testimony shows that from recent sales and even from a recent purchase of substantially similar land by this board it could reasonably have been apprehended that the fair market value of the tract of thirty-two and one-half acres would not exceed \$1,000.

The board has had conferred upon it by the legislature the power of condemnation to meet just such a situation as this. Under these circumstances the failure of the board to have recourse to proceedings in condemnation, in view of the excessive purchase price demanded, is an unreasonable and improvident exercise by the board of the powers conferred upon it.

The resolution is set aside.

CHIMINE v. BAKER †

32 Tex. Civ. App. 520. 1903

BILL by Baker and others against Chimine and others. Defendants appeal.

FLY, J. . . . It was alleged in the petition that, under the authority

625 Reasonableness Test 12, 13

granted it by its charter, the city of Houston had passed ordinances in 1897 and 1899 prescribing fire limits, in which the erection or placing of any building of combustible material, or any material not fireproof, within certain limits, was prohibited, and penalties fixed for violations of the same; that appellants were constructing a building within said limits of wood and other materials not fireproof and incombustible, in immediate contact with the building and improvements of appellees. . . .

It is the contention of appellants that the ordinance is unreasonable, in prescribing that none but buildings made of "fireproof" or "incombustible" materials should be constructed within the fire limits, and, reason and experience teaching that no such material can be obtained that is suitable for the construction of buildings, it is practically a prohibition of the erection of houses within such limits. The terms "fireproof" and "combustible materials," used in the charter and ordinance, should not be given a literal construction, but a liberal and reasonable one, and the meaning assigned to them in the ordinary and common acceptance of the terms. . . .

The ordinance of which complaint is made is authorized by the charter of the city of Houston, which empowers the city council to "prohibit the erection, building, placing, moving, or repairing of wooden buildings within such limits in said city as they may designate and prescribe; . . . and may direct, require, and prescribe that all buildings within the limits so designated and prescribed shall be made or constructed of fireproof materials."

The ordinance uses the words "combustible material or any material not fireproof." The words are practically the same used by the legislature in the special charter of 1897 granted to the city of Houston. To inquire into the reasonableness of the ordinance would be to inquire into and attack the reasonableness of a law enacted by the legislature of the State. The ordinance is not dependent for its vitality on some power incidental to some general power granted to the city, but it follows the language of the legislative grant for that specific purpose almost to the letter. After the power of courts to sit in judgment on the reasonableness of city ordinances resting for their authority on some general grant of power had been conceded, Judge Dillon says: "Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature." *Dill., Mun. Corp.* § 328. The text is supported by numerous authorities. In the case of *A Coal Float v. City of Jeffersonville (Ind.)*, 13 N. E. 115, it is said: "While the reasonableness of an ordinance is a question of law for the decision of the court, an ordinance cannot be held to be unreasonable which is expressly authorized

by the legislature. The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the legislature has enacted nothing on the subject-matter of the ordinance and consequently to cases in which the ordinance was passed under the supposed incidental power of the corporation merely." That case has been followed a number of times in Indiana. *Railway v. Harrington*, 30 N. E. 37; *Champer v. Greencastle*, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390; *Rund v. Fowler*, 41 N. E. 456; *Beiling v. Evansville*, 42 N. E. 621, 35 L. R. A. 272; *Shea v. Muncie*, 46 N. E. 138. In the case of *Raffetto v. Mott* (N. J. Sup.), 38 Atl. 857, it was said: "When an ordinance has been passed by a municipal body under legislative power, which is granted in definite and precise terms, such ordinance cannot be set aside as unreasonable."

Even if the strictest interpretation be placed upon the words "fireproof" and "incombustible material," it cannot be claimed that the legislature of the State has not the power to delegate to cities the authority to prohibit, within certain limits, buildings of that class of materials. Even if the reasonableness of such legislation could be the subject of inquiry, it was one to be inquired into in this case in the light of the evidence, and that tended to establish that absolutely fireproof buildings could be erected. . . .

STATE v. MOTT

See 51 Am. & Rev. R.

61 Md. 297. 1883

ALVEY, C. J. . . . Within the power granted, the degree of necessity or propriety of its exercise rests exclusively with the proper corporate authorities; but in all cases the power exercised, or attempted to be exercised, must depend upon the nature and extent of the power granted, and whenever the question of the existence or limit of power is raised, it becomes the plain duty of the courts to see that the corporate authorities do not transcend the authority delegated to them.

The legislature has delegated to the city of Baltimore very large and ample powers to preserve health, and to prevent and remove nuisances, and also to regulate the places for carrying on lawful but offensive trades; but this power, as ample as it is, does not authorize the excess of an unlimited control over the trades and business occupations of the people. The terms of the grant of power by the State to the city are, that the mayor and city council shall "have power to pass ordinances to preserve the health of the city, to prevent and remove nuisances, and to prevent the introduction of contagious diseases within the city

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and within three miles of the same, and may regulate the places for manufacturing soap and candles, the erecting of slaughter-houses, and distilleries, and where every other offensive trade is carried on." Code, Pub. Local Laws, art. 4, § 797.

It was under the power thus granted that ordinance No. 113 of 1882 was passed to be added as section 43½ to article 23 of the City Code. That ordinance provides "that from and after May 1, 1882, it shall not be lawful for any person or persons, or body corporate, to work, operate, or continue in use, for the purpose of burning oyster-shells or stone lime, any kiln situated or erected within the limits of the city of Baltimore, under a penalty of twenty dollars for each and every day such kiln may be so worked, operated, or continued in use for the purpose aforesaid."

It will thus be perceived that by this sweeping ordinance the entire industry of lime burning within the limits of Baltimore is at once forbidden and destroyed. Though the kilns may be on the remotest outskirts of the city, and beyond the reach of habitation, where they are not now, and may never become nuisances, and from whence they could in no manner affect the health of the city, they are all declared to be unlawful, and are forbidden to be continued. A stronger exertion of municipal power has seldom been attempted to be exercised over the property and the lawful pursuits of the citizen; and to support the ordinance by which such results are designed to be effected, the authority in the city must appear to be plain and unmistakable.

The indictment in this case was found under Act of 1880, ch. 211, for the alleged violation of the ordinance No. 113, just recited; and it simply charges, after reciting the ordinance *verbatim*, that from the 1st to the 18th of May, 1883, the defendant "did unlawfully work, operate, and continue in use, a certain kiln, situate within the limits of the city of Baltimore, for the purpose of burning oyster-shells and stone lime, contrary to the ordinance in such case made and provided." There is nothing alleged to constitute the lime kiln of the defendant a nuisance, nor is it alleged that it is a nuisance *per se*, either as to health, comfort, or danger to property. It is simply alleged, as will be observed, that the defendant operated his lime kiln within the limits of the city, contrary to the terms of the ordinance, which absolutely prohibits the operation of any lime kiln, without reference to its local surroundings, within the limits of the city after a certain date.

The defendant demurred to the indictment, as it was his right to do, and thereby admitted the fact that he had operated his lime kiln as charged. Indeed he was reduced to the alternative of either denying the fact that he had operated his lime kiln after the time designated in the ordinance, or taking issue in law as to the validity of the ordinance. He made the latter issue, and that presented the question, whether or not it was competent to the mayor and city council, by ordinance, under the authority delegated to them, to prohibit absolutely, without

condition or qualification, the burning of lime within the limits of the city of Baltimore.

Now it is well known and understood, that the burning of lime is not an unlawful business or trade, and is not a nuisance in its nature *per se*, irrespective of the location. On the contrary, it is one of a multitude of most useful and necessary processes for the benefit of society and for its material improvement, but which may, from mere local conditions, become nuisances. Or as said in *Aldred's case*, 9 Co. 59a, "the building of a lime kiln is good and profitable; but if it be built so near a house that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it." But neither in the ordinance, nor in the indictment founded thereon, is there anything apparent that justifies the conclusion that all the lime kilns within the limits of the city, and which have been prohibited operation, are in fact nuisances. And not being nuisances in their nature, irrespective of their local surroundings, it is very clear that there has been no authority conferred upon the mayor and city council to make them nuisances, either to health, comfort, or property, by simply declaring them so. In the absence of such express authority, the principle is too well settled to require the citation of authorities for its support, that a particular use of property declared a nuisance by an ordinance of a municipal corporation does not make such use a nuisance, unless it be so in fact, according to the common-law or statutory definition of nuisance. The ordinance in question however does not in terms declare lime kilns within the limits of the city nuisances. It simply prohibits their operation altogether, but upon what particular ground does not distinctly appear. But the provision in the charter only confers authority "to prevent and remove nuisances;" and the mere possibility that all the lime kilns within the limits of the city may in the future become nuisances does not justify the city in prohibiting the business entirely in anticipation. Upon any such principle of action by the city, many of the most valuable and indispensable trades might be stopped.

Whether a particular lime kiln is a nuisance or not is a mixed question of law and of fact; and an indictment for maintaining such kiln as a nuisance should charge the facts necessary to bring it within the definition of a nuisance, or at least within the power conferred by the statute to suppress it. Here the power conferred by the statute, and attempted to be executed by the general prohibitory ordinance, cannot be taken to authorize the extra-judicial condemnation and destruction of that as a nuisance, which in its nature, situation, or use, is not or may not be such. 1 *Dill., Mun. Corp.* (3d ed.) § 374, and the cases there cited; *Wood, Nuis.*, § 740. To have adjudged the indictment good would have required the court to assume that all the lime kilns within the limits of the city were nuisances *per se*, without regard to their location, or that they were allowed by the statute to be condemned unconditionally. This the court would not have been justified in doing as matter of law;

nor would the court have been justified in assuming that all such lime kilns would necessarily become nuisances, and were therefore subject to the power of prevention.

In the case of *Glenn v. Mayor, etc., of Baltimore*, 5 Gill & Johns. 429, this court, in speaking of the power of city authorities to abate nuisances said: "Thus, whether the various manufactories spoken of in the 17th section of the ordinance are calculated to endanger the habitations or the health of the inhabitants, may be a matter of science, upon which possibly a diversity of views might be entertained, and thus the legitimate exercise of the power might become a mixed question of law and of fact. The city authorities might pronounce that to be a nuisance which evidence might show was not a nuisance. They might prohibit a particular occupation upon the ground that it increased the danger of fire, when the reverse could be shown by the concurring testimony of all men. The power therefore or the want of power to suppress a particular occupation as a nuisance, or as a means of preventing fire, should be shown in proof." And if required to be shown in proof, upon every principle, in a criminal proceeding, should the facts to constitute the crime be alleged in the indictment. The party proceeded against should have the liberty and the opportunity to controvert the facts. He is not to be concluded on the question of power, simply by the action of the city authorities in the adoption of the ordinance.

Nor can the ordinance in question be sustained under that clause of the section of the charter before recited, which authorizes the city to "regulate the places for manufacturing soap and candles, etc., and where every other offensive trade is carried on."

That power assumes the existence of such trades, and that they may be carried on within the limits of the city. The power delegated is simply to regulate the places where they are carried on, and not to forbid their being carried on, or to destroy them altogether. It is assumed in the power granted that such trades will not be carried on under such condition of things as to constitute them nuisances, and thus bring them within the scope of the general power to prevent or remove nuisances; but that they will be carried on at proper places, subject to the regulating power of the city. And such being the case, it is well settled that a power simply to regulate does not embrace a power to prohibit or destroy a trade or occupation. 1 *Dill., Mun. Corp.* (3d ed.), § 325; *Radecke's Case*, 49 Md. 217. If therefore lime kilns be classed among the offensive trades, subject to have the places of their operation regulated by the city, they are not liable to be prohibited, unless they be nuisances in fact, according to legal definition. On the contrary, the very power of regulation is a full recognition of the legal right to maintain the kilns within the city, unless and until they become nuisances in fact.

Upon the whole, we are of opinion that the ordinance No. 113, designated as section 43½ in article 23 of the Baltimore City Code, is void for the reasons we have stated; and consequently the demurrer to the

indictment, founded upon such ordinance, was properly sustained by the court below, and we must therefore affirm the judgment.

Judgment affirmed.
 BRUCE KILN as v. collecting cases (1905) 2 kns 92. not per se

PEOPLE *ex rel.* WINEBURGH ADVERTISING CO. v. MURPHY * 240

195 N. Y. 128. 1909

nc Bull 6 251 118 1002

APPEAL from an order of the Appellate Division of the Supreme Court, which reversed an order of Special Term denying a motion for a peremptory writ of *mandamus*, and granted said writ.

The relator is engaged in the business of constructing and maintaining advertising signs, and displaying thereon advertisements pursuant to contracts with advertisers.

On June 15, 1908, relator applied for a permit to erect a "sky sign" on the top of a building at 27 East Twenty-second Street, in the city of New York. The defendant, the superintendent of buildings for the borough of Manhattan, refused the permit solely because the ordinances provide that no sky sign shall be over nine feet above the front wall or cornice of the building, and the proposed sign would violate that provision. The application and the proposed structure conform in other respects to the ordinances. The bottom of the sign would be five feet six inches above the roof, and the top thereof would be twenty feet six inches above said front wall or cornice. It is proposed to erect the sign between forty and fifty feet back from the building line on Twenty-second Street and to face it northwest and substantially in the direction of the rear of the building.

The relator applied for a peremptory writ of *mandamus*, to compel the defendant to issue the permit.

Francis K. Pendleton, Corporation Counsel (Theodore Connolly and Clarence L. Barber of counsel), for appellant.

Louis Marshall, for respondent.

CHASE, J. . . . The ordinance of the city of New York to be construed on this appeal defines a sky sign and as so defined it is: "Any letter, word, model, sign, device or representation in the nature of an advertisement, announcement or direction, supported or attached, wholly or in part over or above any wall, building, or structure shall be deemed to be a 'sky sign.'"

The ordinance (section 144 of the Building Code of the city of New York) also provides as follows: "Sky signs shall be constructed entirely of metal, including the uprights, supports and braces for same, and shall not be at any point over nine feet above the front wall or cornice of

the building or structure to which they are attached or by which they are supported.

"All fences, signs, billboards and sky signs shall be erected entirely within the building line and be properly secured, supported and braced and shall be so constructed as not to be or become dangerous. Before the erection of any fence, sign, billboard or sky sign shall have been commenced a permit (for) the erection of the same shall be obtained from the Superintendent of Buildings having jurisdiction as provided in part 2, section 4 of this Code. Each application for the erection of any fence, sign, billboard or sky sign shall be accompanied by a written consent of the owner or owners or the lessee or lessees of the property upon which it is to be erected."

It is not the erection over and above any wall, building, or structure that is prohibited, but the thing constructed plus the letter, word, model, sign, device, or representation in the nature of an advertisement, announcement, or direction, painted or pasted thereon or attached thereto.

So far as appears there is no absolute limitation upon the height that tanks, towers, or chimneys can be erected, nor as to flag-poles, balustrades, finials, or other structures ornamental or useful. If it appeared in the relator's application that the structure proposed to be erected was not for the purpose of advertising, but for any other purpose, fancy, or whim, it would not come within the prohibitive clause of the ordinance. A further examination of the ordinance shows that it relates wholly to erections within the building line and upon private property. It is in no way affected by the rules of law relating to street or municipal property. As private property the owner of the building on which it is proposed to erect the structure can use it in any way that to her may seem desirable, except as such use is subject to the implied obligation resting upon every owner of property to use it so as not to interfere with the rights of others, and also subject to such restrictions as are necessary for the public welfare.

The police power, so difficult to define, but so frequently invoked, is confined to such reasonable restrictions and prohibitions as are necessary to guard public health, morals, and safety, and to conserve public peace, order, and the general welfare. Regulations and ordinances within such general definition are valid. The city may make and enforce such regulations and ordinances, although they interfere with and restrict the use of private property. Compensation for such interference with and restriction in the use of property is found in the share that the owner enjoys in the common benefit secured to all.

Does the ordinance, so far as it relates to sky signs, come within the police power, or is its purpose simply to prevent or restrict a lawful business which it is alleged has been extended until it has become offensive to good taste?

It is not asserted by the city that a sky sign, as defined in the ordi-

nance or as proposed by the relator, has any relation whatever to or effect upon public health or public morals. The only alleged reason for the passage and enforcement of the ordinance is that a structure upon which advertisements are to be placed constitutes a danger by reason of the possibility of its falling into a public street. The danger, so far as it interferes with firemen in passing over the roof of a building, is apparently avoided in the case now before us by the provision that the structure on which the sign is to be erected will have a clear space of five feet and six inches between the roof and the bottom of the proposed structure. A structure nine feet in height, would seem to be as great an interference with firemen in passing over the roof as one erected at a greater height.

An ordinance drawn to protect the public from physical danger should in terms bear some evidence of such purpose. So far as the ordinance in question relates to sky signs, it is general in its terms and it is as prohibitive in remote parts of the city as in the congested parts thereof, and to a structure erected at a safe distance from any street or public place as one erected upon the front wall or cornice of a building situated upon the building line of a public way. The prohibited height is also based upon an arbitrary measurement above the front wall or cornice of the building, notwithstanding the height of the building at the place where it is proposed to erect the structure may be much less or more than at such front wall or cornice of the building. The prohibition is, therefore, not dependent upon the dangerous location of the structure nor is it based upon the height or safety of the particular thing constructed.

But the more serious objection to the ordinance is in the fact that the absolute prohibition is confined wholly to sky signs as they are defined therein. The physical danger to the public does not arise from the advertisements. The advertisement, announcement, or direction bears no relation to the safety of the structure itself. It is not the structure, therefore, that is prohibited. Would a structure of any description be more dangerous if it bore the words "Omega Oil"? Could a city enact and enforce an ordinance limiting the height of all buildings therein which are painted a particular color and leave unrestricted the height to which a building could be erected so long as it was unpainted or painted a color other than the particular one specified? Such an ordinance would bear evidence in itself that it was not enacted for any purpose within the police power. It appears from the ordinance in question that it was not enacted in the interest of public health, morals, or safety, or to conserve public peace, order, and general welfare, and the ordinance so far as it relates to sky signs is arbitrary and unauthorized.

This court in *City of Rochester v. West* (164 N. Y. 510) sustained an ordinance forbidding the erection of billboards more than six feet in height *without the consent of the common council*. The court, referring to the charter of the city, say: "We think this statute conferred upon

the common council of the city authority to regulate boards erected for the purpose of bill posting, so far, at least, as such regulation was necessary to the safety or welfare of the inhabitants of the city, or persons passing along its streets. . . . It is obvious that its purpose was to allow the common council to provide for the welfare and safety of the community in the municipality to which it applied. If the defendant's authority to erect billboards was wholly unlimited as to height and dimensions, they might readily become a constant and continuing danger to the lives and persons of those who should pass along the street in proximity to them " (p. 513).

In *Commonwealth v. Boston Advertising Company* (188 Mass. 348) the court held invalid an ordinance or regulation relating to signs, posters, or advertisements, and say: "The plain and intended purpose of the rule is to prohibit the use of land near public parks and parkways for advertising. . . . Rules intended to prohibit advertisements of indecent or immoral tendencies, or signs dangerous to the physical safety of the public, no doubt would be reasonable within the meaning of the statute and valid. We think the case of *Rochester v. West* (164 N. Y. 510) was decided and can rest only on this ground."

We quote from the headnote in *Bryan v. City of Chester* (212 Penn. St. 259) which fairly states the holding of the court as stated in the opinion as follows: "A municipality has no power to enact an ordinance forbidding citizens to erect billboards on their own property merely because such boards are unsightly or may create a nuisance. Any citizen against whom such an ordinance is sought to be enforced is entitled to the protection of a court of equity. Under the police powers of a municipality it may prohibit the erection of insecure billboards within its limits, prevent the exhibition from secure ones of immoral or indecent advertisements or pictures, and protect the community from any actual nuisance resulting from the use of them, but it can go no further. All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort of the public, but a limitation without reason or necessity cannot be enforced."

In *Crawford v. City of Topeka* (51 Kan. 756) the court, construing an ordinance that provided that no billboard or structure for advertising purposes should be erected unless at a certain distance from the line of the street, say: "The unreasonableness of the ordinance in question is easily seen when it is considered that the mere posting of a harmless paper upon a structure changes it from a lawful to an unlawful one. A person may erect a fence around his lot without violating the ordinance; but just as soon as an advertisement is posted or painted thereon, it is brought within the condemnation of the ordinance, and the owner is liable to prosecution and punishment."

In *Bill Posting Sign Company v. Atlantic City* (71 N. J. Law, 72) the court held that an ordinance forbidding the erection of signs upon

private property in Atlantic City without regard to whether such signs may be dangerous to public safety is invalid, and in the opinion the court say: "The recognition of a power so wide would bestow upon the law maker the right to invest cities with authority to control the size and style of buildings which should be erected upon private property where the public safety was in no wise involved."

In *City of Passaic v. Paterson Bill Posting Advertisement & Sign Painting Company* (72 N. J. Law, 285), the court, referring to an ordinance, say: "The very fact that this ordinance is directed against signs and billboards only, and not against fences, indicates that some consideration other than the public safety led to its passage. It is obvious from the face of the ordinance that the object of the first section was not to secure the public safety; that section contains no reference to a dangerous condition of billboards, while the second section expressly undertakes to deal with those that become dangerous. . . . Æsthetic considerations are matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

In *City of Chicago v. Gunning System* (214 Ill. 628) the court, in condemning an ordinance prohibiting certain billboards, say: "The purpose . . . seems to be mainly sentimental, and to prevent sights which may be offensive to the æsthetic sensibilities of certain individuals residing in or passing through the vicinity of the billboards."

A municipality, in enacting ordinances relating to the safety of the public, may undoubtedly make reasonable classifications among structures with reference to their location and the necessity or importance thereof without offending against the provisions of the Fourteenth Amendment of the Federal Constitution.

The classification, as well as the ordinance itself, must be based upon some necessity justifying the exercise of the police power. It has been said that the police power of a municipality is allied to the right of self-preservation in an individual. In exercising such power or right, the purpose thereof, and the limitations thereon, should not be forgotten. The classification of the sky sign by the ordinance in question is dependent upon the letter, word, model, sign, device, or representation in the nature of an advertisement, announcement, or direction, and it has no direct relation to the safety of the public. An ordinance which purports to legislate for public safety must tend in some appreciable way to that end. Unless there is a substantial connection between the assumed purpose of the ordinance and the end to be accomplished, such ordinance is unenforceable. *Matter of Jacobs*, 98 N. Y. 98; *People v. Orange Co. Road Cons. Co.*, 175 N. Y. 84; *People v. Gillson*, 109 N. Y. 389; *Health Department v. Rector, etc.*, 145 N. Y. 32; *People v. Ewer*, 141 N. Y. 129; *Fisher Co. v. Woods*, 187 N. Y. 90.

We think that the order of the Appellate Division was right, and that it should be affirmed, with costs.

CULLEN, C. J., VANN, WERNER, and HISCOCK, JJ., concur with CHASE, J.; HAIGHT, J., concurs in result, in memorandum, with whom WILLARD BARTLETT, J., concurs.

Order affirmed.

CITY OF EVANSVILLE *et al.* v. MILLER *

146 Ind. 613. 1896

ACTION by Miller in the Superior Court to prevent the collection of an assessment of \$199 levied by the board of public works of the city on certain real estate owned by Miller, situated within the city. The record shows that Miller bought the land in May, 1895, and that a dwelling-house was then situated thereon which had been partly destroyed by fire.

By statute the common council is empowered to declare what shall constitute a nuisance, as stated in the opinion of the court. In June, 1895, the common council passed an ordinance defining nuisances, the first section of which provides, "That any building, shed, outhouse, or structure of any kind that shall be partially destroyed by fire, or from any other cause, and shall be suffered by the owner thereof to remain in such condition, after being notified by the department of public works to remove, repair or rebuild the same, shall constitute a nuisance."

Section 2 provided that whenever the department of public works should have knowledge "that any nuisance such as is defined in section 1 of the ordinance exists in said city, it should thereupon make an order requiring the owner thereof to abate the same within such time as said department may fix." This section further provides for giving notice of the order to such owner, and declares it lawful for said department to remove such buildings or structures in whole or in part by persons employed by it, or by letting such work by contract, etc. Section 3 contains provisions for assessing the cost of the removal of the building against the real estate in like manner as assessments of benefits are made.

In July, 1895, the department made an order, "That whereas the buildings situate" on the above land "have been partially destroyed by fire, and have been suffered by the owner thereof to remain in such condition for a period of twelve months, and by reason thereof have created a nuisance: Now, therefore, it is ordered by said department that the owner of said real estate abate said nuisance by the removal of the whole of said building, or so much thereof as remains unconsumed, together with all offal, dirt, debris, of every kind situate thereon, on or before the 17th day of August, 1895. And it appearing that John A.

John A. Miller
1895
1895

Miller, the owner of said real estate, is a non-resident of the city of Evansville, it is ordered that he be notified of this resolution by publication in a newspaper published in said city. At the expiration of said time, if such owner shall not have abated such nuisance, this department will proceed to abate the same by the removal of such structure, and by such other means as may be deemed necessary."

After the time fixed in the order for the removal of the building had expired, the board of public works made an order for its removal directing the clerk to advertise for bids for the work, and describing the material to be removed as "all that part" of the building "above the stone foundation, stacking all good lumber and brick on the premises, and removing all rubbish and burnt lumber from the premises."

It was admitted that the proceedings under the ordinance were regular, that the assessment was regularly made, and that the contractor complied with his contract.

The court found in favor of Miller, cancelled the assessment, and adjudged void the lien given thereunder by the city. The city appealed.

G. A. Cunningham and E. Q. Lockyear, for appellants.

Gilchrist & DeBruler, for appellee.

JORDAN, C. J. . . . Counsel for appellee deny that the common council of the city of Evansville has, either expressly or impliedly, the power to declare by ordinance that a building partially destroyed and suffered to remain in that condition, shall, by reason of such facts alone, necessarily constitute a nuisance. It will be seen that the ordinance in dispute ordains "that any building, etc., partially destroyed by fire, or any other cause, and suffered to remain in such condition after notice to the owner, etc., shall constitute a nuisance." The latter is declared to exist as the result of these naked facts, and authority is given to the Department of Public Works to abate such declared nuisance at the expense of the owner of the property. These facts alone are the test. The ordinance erects no other standard by which the supposed nuisance is to be measured or determined. No reference or regard whatever is had as to the condition, character, situation, or surroundings, which might tend to render the building unsafe in any manner to the public, or a detriment to the health or inconvenience of the public. There is an entire absence of facts declared, tending to show that if such partially destroyed building is suffered to remain it may be productive of annoyance or injury to the public.

That such a building may become a nuisance if maintained by reason of the ruinous and weak condition of its walls or other parts, thereby rendering them liable to fall and do injury to persons passing by, or resulting in injury to an adjoining owner, is a well established legal proposition. It is said by an eminent author, that such a building, as last mentioned, on a public street is a public nuisance and a private nuisance to those owning property adjacent to it. *Wood's Law of Nuisances*, § 109. It is evident, however, that in such a case the nuisance

would not consist alone in the fact that the building was one that had been partially destroyed, but in its being maintained in its unsafe or dangerous condition. It may, however, be maintained in a partially destroyed condition, and yet be harmless in all respects. The unsafe condition thereof depends on the extent of the destruction; and another feature to be considered would be whether it was remote from a public street or passway. But the ordinance does not take into account any of these facts or features, but expressly condemns and outlaws as a nuisance the maintaining of any partially destroyed building without regard to its character as to danger by reason of its weak condition, or location of surroundings. By section 23 of the act under which the city of Evansville is operating, its common council is empowered to declare what shall constitute a nuisance, and to require its abatement, and to assess the expenses of its removal against the person causing the same or suffering it to exist. Acts 1895, p. 259. But the rule is well settled that a municipal corporation, although empowered by law to declare what shall constitute a nuisance, may not declare that to be one which in fact is not. *First Nat. Bank, etc., v. Sarlls*, 129 Ind. 201, and authorities there cited; *Baumgartner v. Hasty*, 100 Ind. 575; *Village of Des Plaines v. Poyer*, 123 Ill. 348, 14 N. E. 677; *City of Denver v. Mullen*, 7 Col. 345, 3 Pac. 693; *Everett v. City of Council Bluffs*, 46 Ia. 66; *Yates v. Milwaukee*, 10 Wall. 497; *Tiedeman Lim. Police Power*, § 122; *Wood's Law of Nuisances*, §§ 742, 743, and 744; *Lippman v. City of South Bend*, 84 Ind. 276; *Dill., Mun. Corp.*, § 374; *State v. Jersey City*, 29 N. J. L. 170; *Beach Pub. Corp.*, §§ 1026, 1029, and 1031.

In *Yates v. Milwaukee*, *supra*, the Supreme Court of the United States, in considering the power conferred upon the city of Milwaukee to declare what shall constitute a nuisance, per Justice Miller, said: "It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."

In the case of the *Town of Lake View v. Letz*, 44 Ill. 81, it is said: "There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances."

In *Tiedeman, Lim.*, § 122a, it is said: "A certain use of lands, harmless in itself, does not become a nuisance, because the legislature has declared it to be so."

In *City of Denver v. Mullen*, *supra*, the Supreme Court of Colorado in construing a provision in the charter of the city of Denver conferring authority upon its council to declare what shall be a nuisance and to

prevent and abate the same held that such conferred power did not authorize the council to arbitrarily declare any particular thing a nuisance which had not theretofore been pronounced such by law or so adjudged by a judicial determination. In the course of the opinion, on page 353, the court said: "The proper construction of this language is, that the city is clothed with authority to declare, by general ordinance, what shall constitute a nuisance. That is to say, the city may, by such ordinance, define, classify, and enact what things or classes of things, and under what conditions and circumstances, such specified things are to constitute and be deemed nuisances. For instance, the city might, under such authority, declare by ordinance that slaughterhouses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes, and the like, piled up or remaining for a certain length of time on the sidewalks, or other things injurious to health, or causing obstruction or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination."

We think it is clear, under the authorities, that the common council, by the ordinance in controversy, attempted to declare that a nuisance which in fact, under the law, cannot be so considered, and therefore transcended the power with which it was invested. As asserted by the authorities, it would be a dangerous doctrine and fraught with much evil to recognize the authority of a municipal legislature to declare that a nuisance which its own caprice might deem proper to outlaw as such. Even though such power is expressly conferred by the legislature, it is utterly inoperative, unless the thing so declared to be a nuisance is one in fact, or was created or erected after the adoption of the ordinance and in defiance thereof. *Wood's Law of Nuisances*, § 744.

What the legislature cannot do directly in this respect it cannot authorize a municipal corporation to do. Without further extending this opinion, we are, under the authorities cited, constrained to hold that the part of section 1 of the ordinance, as indicated by the italics, is void for the reasons herein stated, and the proceedings thereunder by the city, involved in the case at bar, consequently, cannot be maintained.

Judgment affirmed.

City Chase Sanatorium v DC. (1917) 46 App DC 558 acc

PEOPLE *ex rel.* COPCUTT, APPELLANT, v. BOARD OF
HEALTH OF THE CITY OF YONKERS,
RESPONDENT †

140 N. Y. 1. 1893

APPEAL from a judgment of the General Term of the Supreme Court, which affirmed proceedings of the board of health of the city of Yonkers brought up for review by *certiorari*, and ordered a recovery in its favor against the relator.

Complaint having been made to the board of health of the city of Yonkers that several dams on the Nepperhan River, a small stream which flows through that city, were nuisances, the board ordered notice to be given the owners to show cause at a certain time why the dams should not be removed. The notice was given. Relator, one of the owners, appeared and gave evidence that his dams were not nuisances and did not create nuisances. Evidence was also given to the contrary. The board determined that the dams were nuisances, and ordered them removed.

The relator then instituted this proceeding by *certiorari* to review that decision. The board made return to the writ, setting forth its proceedings, and the evidence taken by it, but stating that its determination and action were based "mainly on the individual inspection, knowledge and experience of the members of said board of health concerning the ponds" on the stream and the condition thereof; and that consequently the board could not produce all the proofs and grounds on which its decision was based.

Calvin Frost, for appellant.

James M. Hunt, for respondent.

EARL, J. The disposition of this case turns largely upon the effect and the construction of the statutes constituting the board of health, and defining its powers and duties, and we will, therefore, first give attention to the statutes.

By chapter 184 of the Laws of 1881, an act to revise the charter of the city of Yonkers, it is provided in title 9 that the mayor, the supervisor, the president of the common council, the president of the board of water commissioners, the president of the board of police, and the health officer shall constitute the board of health of the city, and the board is given power, among other things, "to suppress, abate and remove any public nuisance detrimental to the public health," and in addition to other remedies which it may possess by law, it is empowered to issue its warrant whenever necessary to the sheriff of the county of Westchester, or to any policeman of the city, authorizing and commanding him to forthwith suppress, abate, and remove such public nuisance, at the expense of the lot whereon the nuisance exists,

and of the owner thereof, to be enforced and collected as in the act provided. It is further provided that, in addition to the powers expressly granted in the act, the board shall "have and exercise all the powers now or at any time hereafter conferred upon boards of health in cities by any general law," and it is authorized to make ordinances, rules, and regulations to carry into effect its powers, and to enforce observance of them by penalties and by action instituted in its name to recover penalties and to restrain and abate the nuisance. By chapter 270 of the Laws of 1885, the general act for the preservation of the public health, it is provided that the board of health in any city of the State, except the cities of New York, Brooklyn, and Buffalo, shall have the power, and it shall be its duty, "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances or causes of danger or injury to life and health within the limits of its jurisdiction; to enter upon or within any place or premises where nuisances or conditions dangerous to life and health are known or believed to exist, and by appointed members or persons to inspect and examine the same, and all owners, agents and occupants shall permit such sanitary examinations, and said board of health shall furnish said owners, agents and occupants, a written statement of results or conclusions of such examinations; and every such board of health shall have power, and it shall be its duty, to order the suppression and removal of nuisances and conditions detrimental to life and health found to exist within the limits of its jurisdiction," and "to make, without the publication thereof, such orders and regulations in special and individual cases, not of general application, as it may see fit, concerning the suppression, and removal of nuisances." It is further authorized to abate nuisances, and to impose penalties for the violation of its orders and regulations, and the violation of them is also made a misdemeanor, and it may commence actions to restrain and abate nuisances, and to enforce its orders and regulations.

A careful examination of the two acts shows that there is no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance upon his premises. The right to such a hearing is not expressly given and cannot be implied from any language found in either act or from the nature of the subjects dealt with in the acts. Boards of health and other like boards act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination. There is no provision in the acts for calling or swearing witnesses, and there is no general law giving them power to do so. Section 843 of the Code of Civil Procedure is not applicable to such a case, for the reason that the board is not authorized by law to hear testimony or take the oral examination of witnesses.

The question may be asked, How can these provisions conferring powers upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the Constitution securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of nuisances final and conclusive upon the owners of the premises whereon they are alleged to exist. Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishment, the party proceeded against must have a hearing, not as matter of favor but as matter of right, and the right to a hearing must be found in the acts. *Stuart v. Palmer*, 74 N. Y. 183.

As we have said, there is no provision of law giving any party a right to a judicial hearing before these boards, and there is no provision making their determination final. If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions. Boards of health under the acts referred to cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them jurisdiction to act. Their acts declaring nuisances may be presumptively valid until questioned or assailed, for the same reasons which give presumptive legality to the acts of official persons under the maxim *omnia praesumuntur legitime facta donec probetur in contrarium*.

What operation then does the order or ordinance of the board of health have under these acts? The nuisance actually existing and the jurisdiction having been regularly exercised, the order or ordinance has all the operation and effect provided in the act, and the persons who abate the nuisance have the protection which they would not have as private persons abating, not a private nuisance especially injurious to them, but a public nuisance injurious to the general public.

It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board, and all persons acting under their authority in abating the alleged nuisance, act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property as a nuisance unless they know it to be such, and if there be doubt whether it be a nuisance or not the board should

proceed by action to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do.

It may further be asked, What, under this view of the law, is the remedy of the owner of property threatened with destruction or actually destroyed as a nuisance? He may have his action in equity to restrain the destruction of his property if the case be one where a court of equity under equitable rules has jurisdiction, or he may bring a common-law action against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he will have due process of law; and if he can show that the alleged nuisance does not in fact exist he will recover judgment notwithstanding the ordinance of the board of health. Thus the views we take of these acts and similar acts conferring powers upon local officers to proceed summarily upon their own view and examination furnish adequate protection to boards of health, to the public and to property owners; and while these views are not supported by all the decided cases upon the subject, they have the support of the best reasons and of ample authority. In *Cooley's Constitutional Limitations* (5th ed.), at page 722, in a note, the learned author, speaking of boards of health, says: "Though they cannot be vested with authority to decide finally upon one's right to property, where they proceed to interfere with it as constituting a danger to health, yet they are vested with quasi judicial powers to decide upon what constitutes a nuisance, and all presumptions favor their actions." And again, at page 742, in a note citing authorities, he says: "Whether any particular thing or act is or is not permitted by the law of the State must always be a judicial question, and, therefore, the question what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to local legislative or administrative boards. The local declaration that a nuisance exists is, therefore, not conclusive, and the party concerned may contest the fact in the courts." Dillon in his work on *Municipal Corporations* (4th ed.), § 374, says: The authority to prevent and abate nuisances and its summary exercise "may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal nature of a nuisance; but such power conferred in general terms cannot be taken to authorize the extra-judicial condemnation and destruction of that as a nuisance which in its nature, situation or use is not such." [The court here referred to *Yates v. Milwaukee*, 10 Wall. 497, and *Hutton v. Camden*, 39 N. Y. L. 122.]

In *Underwood v. Green* (42 N. Y. 140), the action was to recover the value of dead hogs removed under the direction of the city sanitary inspector, an officer clothed with judicial discretion, and acting under a city ordinance declaring that all dead animals "be forthwith removed and disposed of by removal beyond the limits of the city or otherwise, so as most effectually to secure the public health;" and it

was held that it must be shown, in order to justify the act, that the dead hogs were or would become in some way dangerous or deleterious to public health. The following are also instructive authorities upon the same subject: *Mayor, etc., of New York v. Board of Health* (31 How. Pr. Rep. 385); *Clark v. Mayor, etc., of Syracuse* (13 Barb. 32); *Rogers v. Barker* (31 *id.* 477); *Coe v. Schultz* (47 *id.* 64); *Lawton v. Steele* (119 N. Y. 226).

The result of these authorities is that whoever abates an alleged nuisance and thus destroys or injures private property, or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril, and when his act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy and is founded upon fundamental constitutional principles.

The way is now clear to the disposition of this case. The board of health did act and had a right to act upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party. It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by *certiorari*. *People ex rel. v. McCarthy*, 102 N. Y. 630. . . .

All concur.

Judgment affirmed.

2. Discrimination

ADAMS v. BRENAN *et al.*

177 Ill. 194. 1898

MR. JUSTICE CARTWRIGHT. Appellant, a taxpayer of the city of Chicago, suing on behalf of himself and the other taxpayers, filed his bill in this cause March 14, 1898, in the Superior Court of Cook County, against the board of education of said city of Chicago, John A. Knisely, a contractor, and said city of Chicago, asking to have a contract between the board of education and Knisely, declared illegal, and to restrain the defendants from carrying out the same or expending money thereunder.

The facts stated in the bill are substantially as follows: In September, 1897, the board of education entered into an agreement with an organization in said city known as the "Building Trades Council," representing labor or trades unions in said city, by which the board of education on its part agreed to insert in all contracts for work upon school buildings a provision that none but union labor should be employed in

such work and that none but union workmen should be employed and placed upon the pay-rolls of said board. The Bryant School, one of the school houses under the care of the board, being in need of repair, the board advertised February 5, 1898, for bids for the construction of a roof on an addition thereto, which advertisement contained the following:

"*Notice* — None but union labor shall be employed on any part of the work where said work is classified under any existing union.

"By order of Board of Education."

On February 11, 1898, the defendant, John A. Knisely, among other contractors, submitted his bid for the roof, in which he agreed to furnish material and do the work in strict accordance with the plans and specifications prepared and on file in the office of said board for the sum of \$2090, and to be bound by said condition, and further stated: "I, the undersigned, will do the above work for the sum of \$1900, provided all conditions as to the employment of none but union labor are stricken from the specifications and contract made accordingly. This last bid is made, not necessarily because the undersigned expects to employ non-union labor for this work, but because it is worth to him the difference to have the liberty to do so should circumstances make it necessary or advisable." On February 23, 1898, the board accepted Kniseley's higher bid of \$2,090 with the restriction, and awarded to him the contract. About March 1, 1898, the board and Knisely entered into a contract in accordance with the bid so accepted, containing a provision that none but union labor should be employed by him. . . .

The court dismissed the bill for want of equity appearing upon its face.

It is plain that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition and to increase the cost of work. It is unquestionable that if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should by a statute undertake to require this board, as the agency of the State in the management of school affairs in the city of Chicago; to adopt such a rule or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void as in conflict with the constitution of the State. If such a restriction were sought to be enforced by any law of the State it would constitute an infringement upon the constitutional rights of citizens, so that the State in its sovereign capacity, through its legislature, could not enact such a provision. *Millett v. People*, 117 Ill. 294; *Fraser v. People*, 141 *id.* 171; *Braceville Coal Co. v. People*, 147 *id.* 66; *Ramsey v. People*, 142 *id.* 380; *Ritchie v. People*, 155 *id.* 98; *People v. Chicago Live Stock Exchange*, 170 *id.* 556. There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members

of some particular party or church. In any such case it might be said that the board entertained a *bona fide* opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be attained; or that the members of a church, on account of their higher standard of morality, would more faithfully and conscientiously carry out the contract. The fact that the board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work.

There seems, however, to be a claim that the board of education, although it could not be lawfully required or authorized to make such a contract, may have some sort of discretion to do so, and the only question in the case on the subject of the validity of such contract is, whether the board possesses power beyond that of the legislature, in which is vested the entire legislative authority of the State. Upon what theory it could be claimed that this board of education, which exercises merely the function of the State in maintaining public schools within a limited portion of the State, can possess either power or discretion which the State in its sovereign capacity could not confer upon it we are unable to imagine. No argument is made which would justify such a conclusion. There can be no greater power in the board to act of its own motion than by virtue of positive law. The results, in either case, are equally in conflict with the organic law, and such legislation, contract, or action, whatever form it may take, is void. Nor can the fact, if it be a fact, that an individual might make such a bargain authorize these public officers exercising a public trust to do so. The individual may, if he chooses, give away his money, but the public officer, acting as a trustee, has no such liberty, and no right to surrender to a committee or anyone else the rights of those for whom he acts.

The complainant, as a taxpayer, is a proper party to question the action of the board. The contract containing the illegal provision was entered into voluntarily by the contractor, in pursuance of his alternative propositions submitted to the board. There is injury to the taxpayer on account of the unlawful agreement, and he is not deprived of a remedy for his wrong because neither the contractor nor any excluded laborer has questioned the contract.

There is another ground upon which complainant has an undoubted right to maintain the bill, and that is, that the contract tends to create a monopoly and to restrict competition in bidding for work. The board of education may stipulate for the quality of material to be furnished and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to limit competition by preventing contractors from employing any except certain persons and by excluding

therefrom all others engaged in the same work, and such a provision is illegal and void. A taxpayer may resist an attempted appropriation of his money in execution of such a contract. *Fishburn v. City of Chicago*, 171 Ill. 338.

It is suggested that there can be no relief because the bill fails to show that the contractor, Knisely, did not enter upon the work under his contract before the bill was filed. The illegality of the contract results from public law, which he was bound to know; and the provision was wholly outside of the powers of the board of education. Under no circumstances could he be entitled to the \$190 which was the direct result of such illegality. The bid furnishes, in this case, the exact measure of the injury to the taxpayers resulting from the unlawful restriction, and the question whether he had entered upon the performance of the contract could not, in any event, go further than to the question of the extent of relief to be granted.

No question concerning the merits of labor or trades unions is in any way involved in this case. The right of organization for mutual benefit in all lawful ways is not denied. The question is, whether the board of education has a right to enter into a combination with such an organization for the expenditure of the taxpayers' money for the benefit of members of the organization, and to exclude any portion of the citizens following lawful trades and occupations from the right to labor. It has no such right.

The decree of the court dismissing the bill is wrong, and it is reversed and the cause remanded for proceedings in conformity with what is here said.

Reversed and remanded.

CITY OF MOBILE *et al.* v. BIENVILLE WATER SUPPLY CO.*

130 Ala. 379. 1901

APPEAL from Chancery Court, Mobile County. Bill by the Bienville Water Supply Company against the city and others, seeking to prohibit the city from discriminating against the Water Company and its water consumers. The bill alleges facts substantially as follows:

The company was chartered by the State to supply water to the city and its inhabitants, has laid its pipes in the streets, and is supplying water to customers in the city for family use, sewerage, and other purposes. Under statutory authority, the city has established a system of waterworks and sewers for the use of itself and its inhabitants, and is operating both systems. In furnishing water to its inhabitants, it includes those upon streets in which there are no sewers. It has power under the statute to compel persons to connect with its sewers; and

"to fix and charge such reasonable rates for the purpose of maintaining and operating said sewerage system and paying the interest on the bonds issued by the city of Mobile to build said sewerage system, as said mayor and general council may deem proper."

The city has never fixed any rate for the use of its sewers alone, but charges a certain rate for its water supply together with the sewer service. It will not allow any customers of complainant's water to connect with or use its sewers, except at the same price as is charged for both its water and sewers together; in effect forcing the inhabitants to take the city water or pay for the water of complainant in addition to what such citizen would have to pay for the city's water and sewerage together; discriminating, as is alleged, against complainant, and making it, in effect, furnish water for nothing, or lose its customers by reason of the double charges so imposed on them; and the city through its officers and agents, threaten the people of Mobile, that they will not be allowed to use the sewers, unless they subscribe for and take the city water, and will not be allowed to use the water of complainant in connection with the city's sewers. The city charges its own customers on streets where there is no sewer service, the same rate that it charges others for both water and sewers, along streets where said sewers are laid; which, it is alleged, is a discrimination in charges for sewerage, not only against complainant and its customers of water, but also against all consumers of water and customers of the city, not on the streets or lines where the sewers are laid.

The prayer is, in substance, that the court will prohibit the defendants, their officers, agents, and employees from discriminating against the company and its customers and water consumers in rates of charges for the use of sewers, from charging such customers and water consumers for using the sewers any more than they charge the consumers of the city's water for the sewer service alone, from charging the same price for the use of its sewers that it charges for the use of both sewers and water together, and from charging to or collecting from the complainant or its customers and consumers of water any sums whatever until the city has fixed a rate of charges for the tapping and use of the sewers.

Demurrers were overruled. Defendants appeal.

B. B. Boone, for appellants.

Bestor, Gray & Bestor and *R. H. Clarke*, for appellee.

HARALSON, J. . . . In 29 *Am. & Eng. Ency. Law* (1st ed.), p. 19, it is said: "The acceptance by a water company of its franchises, carries with it the duty of supplying all persons along the lines of its mains, without discrimination, with the commodity which it was organized to furnish. All persons are entitled to have the same service on equal terms and on uniform rates."

The principle announced is reasonable and necessary. Without it, the business interests and domestic comfort of the community, so far as dependent on supplies such companies furnish, would be at their

mercy, and make them masters in this regard, of the cities they were established to serve. As said by the Supreme Court of North Carolina: "A few wealthy men might combine and by threatening to establish competition, procure very low rates which the company might recoup by raising prices to others not financially able to resist — the very class which most needs the protection of the law. The law will not and cannot tolerate discrimination in the charges of these *quasi*-public corporations. There must be equality of rights to all and special privileges to none, and if this is violated, or unreasonable rates are charged, the humblest citizen has the right to invoke the protection of the laws equally with any other." *Griffin v. Water Co.*, 122 N. C. 206. Such works are established for the promotion of the public health, for the prevention of diseases and spread of the same, and for the comfort and convenience of all the inhabitants alike, and in which all are alike interested. . . .

From the facts of the case, as above recited, if true, — as they must be taken on demurrer, — it distinctly appears, that the city, while it has the authority to do so, has never, by ordinance, fixed any charge or rate for the use of its sewers, and indeed, is making no charge to its own customers for the use of the same; that it charges anyone using its water alone as much as it charges another for the use of both water and sewer; and against those who use the complainant's water, it charges for sewer service, alone, as much as it charges its own customers for both water and sewerage, — thus making its sewers free to those who use its water, while it imposes on complainant's customers a discriminating and onerous charge for the use of its sewers, — as much, as is alleged, as it charges for its own water, and sewerage in addition. Whether intended by the city to so operate or not, one can scarcely conceive of a more effective scheme to deprive the complainant of its customers than the one alleged in the bill. If complainant has to furnish its customers with water, and they are required by the city to pay for sewerage, the same price it charges its own customers for its water and sewerage, it follows the complainant would have to furnish water practically free or abandon the business; for it would be unreasonable to suppose that anyone would use the complainant's water and bear the additional expense imposed for so doing. These sewers of the city are for the public at large, and everyone should be permitted to use them, without any discrimination in charges against him. The franchise to construct sewers being in the nature of a public use, the duty is on the city to supply sewerage to all impartially on reasonable terms. As is said by Mr. Bates: "All persons are entitled to have the same service on equal terms and on uniform rates." In addition, it is averred, as seen, that citizens are notified by the city that they cannot use its sewers unless they subscribe for the city water, and customers of complainant, desiring to return to it, are forbidden by the city from disconnecting from its pipes and connecting with complainant's, — a threat the city has the physical power to enforce.

If these wrongs exist, they should be remedied. The complainant is far more interested and injured than any one or all of its customers. It cannot live and enjoy the rights and privileges bestowed on it by its charter, if by unjust discriminations on the part of the city in operating its sewer system, its customers are taken from it. Its customers might not be willing to incur the trouble and odium of litigation to redress the private wrongs thus done to them, even at complainant's expense. But, complainant itself has rights which should be protected against such alleged wrongs, and is entitled to seek redress in its own name. The city should on considerations of highest equity and justice, as by its charter it is authorized to do, fix a rate for sewer service, distinct from the rate fixed for the use of its water, and this rate should be the same to all persons, including the complainant and its customers; or, it should make them free to all, without discrimination. In other words, these sewers should be used to promote the public health, as free to one person as another, or open to all, if any rate of charges is fixed, on equal terms and on uniform charges for their use. No more than this can be justly and legally claimed by the city under its authority from the legislature, to establish its sewer system.

The complainant is entitled, upon the facts stated, to the restraining power of a court of equity, to remedy the wrongs of which it complains. These continuing wrongs must work irreparable injury, and, as is alleged, the city, the perpetrator of the wrongs, is insolvent. *High, Inj.* par. 1236, 1275; 3 *Pom. Eq. Jur.* par. 1368.

There was no error in overruling the demurrer to the bill.

Affirmed.

SOON HING v. CROWLEY ‡

113 U. S. 703. 1884

THE petitioner in the court below, the plaintiff in error here, was arrested by the defendant, who is chief of police of the city and county of San Francisco, for an alleged violation of the fourth section of an ordinance of the Board of Supervisors of that municipality, approved on the 18th of June, 1883; and while in custody of the officer applied to the Circuit Court of the United States for a writ of *habeas corpus*, in order to obtain his discharge. The Circuit Court refused to issue the writ; the judges of the court being divided in opinion, and that of the presiding judge controlling.

The ordinance was adopted to regulate the establishment and maintenance of public laundries and wash-houses within certain limits of the city and county of San Francisco.

Its fourth section declares that no person owning or employed in a public laundry or a public wash-house within the prescribed limits shall wash or iron clothes between the hours of ten in the evening and six in the morning, or upon any portion of Sunday; and its fifth section declares that no person engaged in the laundry business within those limits shall permit anyone suffering from an infectious or contagious disease to lodge, sleep, or remain upon the premises. The violation of any of these provisions is declared to be a misdemeanor, and penalties are prescribed according to the nature of the offense.

The petition for the writ of *habeas corpus* presented to the judges of the Circuit Court set forth the arrest and detention of the petitioner by the chief of police, the ordinance under which the arrest was made, the complaint before the police judge, and the issue of the warrant under which he was taken into custody. It then proceeded to state that the petitioner had for several years been engaged in working for hire in a public laundry in the city and county of San Francisco, and had in all respects complied with the laws of the United States and of California, and the ordinances of the city and county, except in washing at the hours mentioned; that the business of carrying on a laundry was a lawful one in which a large number of the subjects of the Emperor of China had been and were engaged in the said city and county within the limits prescribed by the ordinance; that there had been for several years great antipathy and hatred on the part of the residents of that city and county against the subjects of China residing and doing business there; that such antipathy and hatred had manifested themselves in various ways and under various forms for the purpose of compelling the subjects of China to quit and abandon their business and residence in the city and county and State; that owing to that feeling, and not otherwise, and not for any sanitary, police, or other legitimate purpose, but in order to force those subjects engaged in carrying on the business of a laundry in the city and county of San Francisco to abandon the exercise of their lawful vocation, and their only means of livelihood, the supervisors passed the ordinance in question; that the petitioner had been and was earning his living exclusively by working at washing and ironing for hire, and in order to gain a livelihood was obliged to work late in the night, and had no other lawful vocation; that on the first of January, 1884, his employer paid the license collector of the city and county six dollars, the amount required by the ordinance to obtain a license to carry on the business of a laundry, and obtained from him a license to carry on the business at a designated place within the prescribed limits. The petition also averred that section 4 of the ordinance was in contravention of the provisions of the Burlingame Treaty, and of the Fourteenth Amendment to the Constitution of the United States, in that it deprived them of the equal protection of the laws.

On the hearing of the application for the writ certain questions arose,

upon which the judges of the Circuit Court were divided in opinion. They were partly as follows:

2. Whether said section is void on the ground that it discriminates between those engaged in the laundry business and those engaged in other classes of business.

3. Whether said section is void on the ground that it discriminates between the different classes of persons engaged in the laundry business.

The opinion of the presiding judge being that the said section was valid and constitutional, the application for the writ was denied; and the judgment entered upon the denial was brought to this court for review.

Mr. David McClure and Mr. Thomas D. Riordan, for plaintiff in error.
No appearance for defendant in error.

MR. JUSTICE FIELD. . . . There is no force in the objection that an unwarrantable discrimination is made against persons engaged in the laundry business, because persons in other kinds of business are not required to cease from their labors during the same hours at night. There may be no risks attending the business of others, certainly not as great as where fires are constantly required to carry them on. The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.

But counsel in the court below not only objected to the fourth section of the ordinance as discriminating between those engaged in the laundry business, and those engaged in other business, but also as discriminating between different classes engaged in the laundry business itself. This latter ground of objection becomes intelligible only by reference to his brief, in which we are informed that the laundry business, besides the washing and ironing of clothes, involves the fluting, polishing, bluing, and wringing of them; and that these are all different branches, requiring separate and skilled workmen, who are not prohibited from working during the hours of night. This fluting, polishing, bluing, and wringing of clothes, it seems to us, are incidents of the general business, and are embraced within its prohibition. But if not incidents, and they are outside of the prohibition, it is because there is not the danger from them that would arise from the continuous fires required in washing; and it is not discriminating legislation in any invidious sense that branches of the same business from which danger is apprehended are prohibited during certain hours of the night, whilst other branches involving no such danger are permitted. . . .

The principal objection, however, of the petitioner to the ordinance

in question is founded upon the supposed hostile motives of the supervisors in passing it. The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence there, and not for any sanitary, police, or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense.

It follows that the several questions certified must be answered in the negative and the judgment be affirmed.

And it is so ordered.

STANDARD OIL COMPANY v. CITY OF
FREDERICKSBURG †

105 Va. 82. 1906

CARDWELL, J., delivered the opinion of the court.

This is a writ of error to so much of a judgment of the Corporation Court of the city of Fredericksburg as upholds the validity of a license tax of \$150.00, imposed by ordinance of the city upon plaintiff in error, for the year beginning May 1, 1904, and ending April 30, 1905.

The learned judge of the Corporation Court has, in a written opinion, made a part of the record, stated the case fully, and discussed in a very satisfactory manner the principles of law applicable thereto, and we, therefore, adopt it as a part of this opinion.

unanimously

"The defendant, the city of Fredericksburg, for the year 1903, levied a license tax of \$150.00 on the plaintiff under section 54 of its tax ordinance, which is as follows:

"Any person, firm or corporation who shall engage in the business of selling to wholesale or retail merchants in this city kerosene oil or other illuminating oil, shall pay a license tax of one hundred and fifty dollars (\$150.00), but this shall apply only to any person, firm or corporation who shall transport such oils in bulk, tank cars, or through pipes for the purpose of distributing the same in this city. Any person, firm or corporation who shall engage in the business of selling to wholesale or retail merchants in this city kerosene oil or other illuminating oil, the same having been transported for distribution in barrels only, shall pay a license tax of seventy-five dollars (\$75.00).'

"The defendant for the year 1904 levied a license of \$150.00 against the plaintiff under section 73 of its license tax for that year, which is as follows:

"Any person, firm, or corporation, who shall engage in the business of selling or offering for sale to wholesale, or to both wholesale and retail, merchants in this city, kerosene oil or other illuminating oil, shall pay a license tax of \$150.00. Any person, firm, or corporation, who shall engage in the business of selling or offering to sell only to retail merchants in this city kerosene oil or other illuminating oil, shall pay a license tax of \$150.00. Any person, firm or corporation, who shall engage in the business of selling or offering to sell to consumers in this city kerosene or other illuminating oil, shall pay a license tax of \$150.00.

"But this section shall apply only to any person, firm, or corporation producing, refining or manufacturing the oil which it sells, or offers to sell, or to any person, firm, or corporation who stores its oil in stationary tanks within or outside of the corporate limits of the city, and transports the same by means of tank wagons, or in barrels, through the streets of the city for the purpose of the distribution or delivery of the oil to purchasers thereof at the place of business of such purchaser.' . . .

"This court, therefore, holds that the plaintiff is liable for the said license taxes, unless they, or either of them, be invalid because discriminatory, or because they deny to the plaintiff the equal protection of the law.

"If the purpose is within the legal powers of the legislature and the classification made has reference to that purpose (excludes no persons or objects that are affected by the purpose; includes all persons that are), logically speaking, it will be appropriate; legally speaking a law based upon it will have equality of operation. *Billings v. Illinois*, 188 U. S. 97; 47 L. Ed. 403; 23 Sup. Ct. 272.

"The differences must bear a just and proper relation to the at-

tempted classification. *Gulf C. & S. F. Co. v. Ellis*, 165 U. S. 150; 41 L. Ed. 66; 17 Sup. Ct. 255.

"An ordinance requiring dealers in oils to pay a license of \$250.00 per year, and providing that this license shall not apply to dealers handling oils on which the license has been paid, is unconstitutional because there is no reasonable ground for classification. (S. C. 1903.) *Standard Oil Company v. City of Spartansburg*, 44 S. E. 377.

"No greater burdens shall be laid upon one than are laid upon others in the same calling and condition. *Barbier v. Connolly*, 113 U. S. 27, 31; 28 L. Ed. 924; 5 Sup. Ct. 357.

"Uniformity must be such as is compatible with the subject matter, and as to licenses the only uniformity required is that the tax shall be the same on all those in the same business. *Commonwealth v. Moore & Goodsons*, 25 Gratt. 958.

"If inequality and want of uniformity in the burden it imposes are stamped upon the face of the law, the law must be pronounced invalid. *Helfrick's Case*, 29 Gratt. 849.

"Uniformity must be such as is compatible with the subject matter, and as to the licenses the only uniformity required is that the tax shall be the same on all those in the same business. *Newport News, etc., R. Co. v. Newport News*, 100 Va. 161; 40 S. E. 645.

"It is not necessary that a statute regulating the sale of goods shall embrace all kinds of property, either personal or real, but it is sufficient if the selection of the articles and property is based on reasonable and just grounds of difference . . . and applies equally to every citizen and all classes of citizens, and denies to no one a privilege which another is permitted under like circumstances to exercise and employ. 8 Cyc. 1069.

"A municipal ordinance imposing licenses or business taxes must not discriminate against any business, or class of business, or against non-residents, or persons engaged in the sale of property produced or manufactured outside the municipality. 21 *Am. & Eng. Ency. Law*, 784.

"When tested by these rules . . . section 54 of the ordinance of 1903 is either invalid or does not apply to the facts of this case. This section applies, by its terms, 'only to any person, firm, or corporation who shall transport such oils in bulk, tank cars, or through pipes, for the purpose of distributing the same in this city.' If the word 'transport,' in this section applies to the distribution of oil through the city after the same shall have reached the company's storage tanks, then the section does not apply, because, under the facts of the case, the company did not transport, or carry, the oil about the streets of the city for sale 'in bulk, tank cars or through pipes;' if the words 'transport such oils in bulk, tank cars or through pipes' refers to the method by which the oil is brought from other places into the city for storage in the company's tanks, then the ordinance must be held to be in-

valid, because, it seems, such a classification, or attempted classification, is unequal, not uniform, and the \$150.00 license tax imposed on the sale of it discriminates against the company's business when such a tax, under the language of the section, would not be imposed upon the sale of the oil produced, or manufactured inside the city, or upon the sale of the oil brought into the city in any manner other than in bulk, tank cars, or through pipes. The business sought to be reached by this ordinance is the 'selling to wholesale or retail merchants in this city kerosene or other illuminating oil,' and is not the business of buying and selling oil. The method or manner by which the oil is introduced into the city before a sale can hardly be said to bear a just and proper relation, or, in fact, any relation at all, to the actual sale of the oil after the same shall have been brought into the city and before an actual sale, or offer of sale, for the same. The business is the selling of oil to wholesale or retail merchants, and the tax of \$150.00 sought to be levied under this section is not placed upon all who sell to retail or wholesale merchants in the city, but is placed only on those who sell to wholesale or retail merchants in the city, and whose oil, which is the subject of the sale, shall have been transported into the city in tank cars or through pipes. *Commonwealth v. Moore & Goodsons*, 25 Gratt. 958.

"This classification rests on no reason of public policy, and there is no substantial difference of situation or circumstances between the oil merchant who sells by wholesale or retail oil not transported into the city in tank cars or through pipes, and the merchant who does sell by wholesale or retail oil that is transported into the city in tank cars or through pipes.

"There is nothing of difference in the two businesses of selling oil, arising from the method by which the oil was transported into the city, that would naturally suggest the justice or expediency of diverse legislation with respect to the classification attempted in this section. *Rosenbloom v. State* (Neb), 89 N. W. 1053; 57 L. R. A. 922 and cases cited.

"The ordinance of 1904, when tested by the same rules, is valid and binding. It requires a license of \$150.00 on those engaged 'in the business of selling or offering for sale to wholesale, or to both wholesale and retail, merchants in the city, kerosene or other illuminating oil,' and applies 'to any person, firm, or corporation who stores its oil in stationary tanks within or outside said corporate limits of the city, and transports the same by means of tank wagons or in barrels through the streets of the city for the purpose of distribution or delivery of the oil to purchasers thereof at the place of business of such purchasers.'

"The manner of distribution of oil through the city and the sale of the same through the city 'by means of tank wagons or in barrels,' it appears, is a reasonable classification.

"Certainly this manner and method of the sale and of the distribu-

tion imposes greater burdens on the streets of the city than if the distributions were not made by tank wagons or in barrels; and again, the distribution of oil through the city, in the sales thereof from door to door and the running of oil from the tank wagon to the cans for delivery to the stores, in itself renders the sale and delivery of oil in this manner more hazardous than otherwise, and the ordinance of 1904 applies to all engaged in the same business. *Newport News, etc., Railway Company v. City of Newport News*, 100 Va. 157; 40 S. E. 645.

"For these reasons an order will be entered relieving the plaintiff from the license tax assessed against it under the ordinance of 1903, and denying its motion for relief from the license assessed against it under the ordinance of 1904." . . .

The fact that only one person, firm, or corporation falls within a class upon which a license tax is imposed, does not of itself make the tax amenable to the charge of discrimination.

The judgment of the Corporation Court is affirmed.¹

Affirmed.

GODDARD, PETITIONER ‡

16 Pickering (Mass.) 504. 1835

PETITION for *certiorari* to the Municipal Court of Boston, to review a conviction of the petitioner for neglecting and refusing to remove the snow from the sidewalk adjacent to his land, in violation of the following ordinance of the city of Boston: "The tenant, occupant, and in case there shall be no tenant, the owner of any building or lot of land bordering on any street, lane, court, or public place within the city (excepting that part of the city called South Boston) where there is any footway or side walk, shall after the ceasing to fall of any snow, if in the day time within six hours, and if in the night time, before two of the clock in the afternoon succeeding, cause the same to be removed therefrom; and in default thereof shall forfeit and pay a sum not less than one dollar, and not more than four dollars, for each and every day that the same shall afterwards remain on such footway or sidewalk."

The city charter grants power to the mayor, aldermen, and common council "to make all such needful and salutary by-laws, as towns, by the laws of this Commonwealth, have power to make and establish; and to annex penalties, not exceeding twenty dollars, for the breach thereof;" and the statutes empower towns "to make and agree upon such necessary rules, orders, and by-laws for the directing, managing and ordering the prudential affairs of such towns, as they shall judge most conducive to the peace, welfare and good order thereof."

¹ See *Ex parte McKenna*, 126 Cal. 429.

request for
instruction

instr.

The defendant, among other requests, asked the court to instruct the jury that the by-law was void because it imposed a tax upon certain persons alone and was not proportional and reasonable; further because it excepted a part of such persons, those situated in South Boston; and because it constituted an unequal apportionment of the public burdens, and was a tax imposed without the consent of the people expressed by an act of the legislature. But the Court instructed the jury that the by-law did not impose a tax on property; but rather a personal duty, and not an unreasonable one, on the occupants of real estate adjacent to sidewalks, to remove the snow in front of their land.

The defendant filed exceptions to the instructions.

Bartlett insisted on the exceptions.

C. P. Curtis, in behalf of the city of Boston.

SHAW, C. J. . . . Another, and perhaps the most important objection, is, that the by-law is one imposing a tax or duty upon the citizens, and it is a violation of the constitution in this, that it is partial, and unequal, and contravenes that fundamental maxim of our social system, that all burdens and taxes laid on the people for the public good shall be equal.

But the court are all of opinion, that the by-law in question is not obnoxious to this objection.

It is not speaking strictly, to characterize this city ordinance as a law levying a tax, the direct or principal object of which is, the raising of revenue. It imposes a duty upon a large class of persons, the performance of which requires some labor and expense, and therefore indirectly operates as a law creating a burden. But we think it is rather to be regarded as a police regulation, requiring a duty to be performed, highly salutary and advantageous to the citizens of a populous and closely built city, and which is imposed upon them because they are so situated as that they can most promptly and conveniently perform it, and it is laid, not upon a few, but upon a numerous class, all those who are so situated, and equally upon all who are within the description composing the class.

It is said to be unequal, because it singles out a particular class of citizens, to wit, the owners and occupiers of real estate, and imposes the duty exclusively upon them.

If this were an arbitrary selection of a class of citizens, without reference to their peculiar fitness and ability to perform the duty, the objection would have great weight, as for instance, if the expense of clearing the streets of snow were imposed upon the mechanics, or merchants, or any other distinct class of citizens, between whose convenience and accommodation, and the labor to be done, there is no natural relation. But suppose there is a class of citizens who will themselves commonly derive a benefit from the performance of some public duty, we can see no inequality in requiring that all those who will derive such benefit, shall by a general and equal law be required to do it. Sup-

posing a by-law should require every inhabitant, who keeps a cart, truck, or other team, or a coach or other carriage, to turn out himself or send a man, with one or more horses, after each heavy fall of snow, to assist in leveling it. Although other citizens would derive a benefit, yet as these derive some peculiar benefit, accompanied with the ability, I can at present perceive no valid objection to a by-law requiring it, on the ground of inequality. Supposing a general regulation, that at certain seasons of the year, every shop-keeper should sprinkle the sidewalk in front of his own shop, or sweep it, inasmuch as he has a peculiar benefit, and as the duty is equal upon all who come within the description, it seems to us to be equal, in the sense in which the law requires all such burdens to be equal. And it appears to us that the case before us is similar. Although the sidewalk is part of the public street, and the public have an easement in it, yet the adjacent occupant often is the owner of the fee, and generally has some peculiar interest in it, and benefit from it, distinct from that which he enjoys in common with the rest of the community. He has this interest and benefit, often in accommodating his cellar-door and steps, a passage for fuel, and the passage to and from his own house to the street. To some purposes therefore it is denominated his sidewalk. For his own accommodation, he would have an interest in clearing the snow from his own door. The owners and occupiers of house-lots and other real estate, therefore, have an interest in the performance of this duty, peculiar and somewhat distinct from that of the rest of the community.

Besides, from their situation, they have the power and ability to perform this duty, with the promptness which the benefit of the community requires, and the duty is divided, distributed and apportioned upon so large a number, that it can be done promptly and effectually, and without imposing a very severe burden upon anyone. Supposing a by-law should require, what is often done, in practice, that upon an alarm of fire in the night, all householders, on streets leading to and near the fire, should exhibit a light. This would seem to be reasonable. Or that all the owners or occupiers of dwelling-houses, having a well and pump, should keep them in repair at their own expense, to be used in case of fire. It would operate partially, but it seems to us not unequal, in the sense in which we are using that term. The city might keep persons ready in every street, to light torches and flambeaux in case of fire, and the expense be paid from the treasury; still it appears to me, that as householders would derive a benefit from the operation of this general regulation, as their local situation puts it peculiarly within their power and ability to perform it without great expense, and as it is equal in its terms, it would not be obnoxious to the charge of being invalid for partiality and inequality.

In all these cases the answer to the objection of partiality and inequality is, that the duty required is a duty upon the person in respect to the property which he holds, occupies, and enjoys, under the protection }

and benefit of the laws, that it operates upon each and all in their turns, as they become owners or occupiers of such estates, and it ceases to be required of them, when they cease to be thus holders and occupiers of the estate, in respect to which the duty is required. In this respect it is like a land tax, or house tax, it does not bear upon owners of personal property, and therefore does not bear upon all citizens alike, but is not on that account unequal or partial, in the sense contemplated by the Declaration of Rights, requiring all taxes and burdens to be equal and impartial.

The court are all of opinion, that as a by-law, the regulation in question was a reasonable one, that it was not repugnant to the constitution or laws of the Commonwealth, and that the conviction was right.

Petition dismissed.

3. *Licenses and Permits*

STATE, MUHLENBRINCK, PROSECUTOR, v. LONG BRANCH COMMISSIONERS *et al.*†

42 N. J. L. 364. 1880

ON certiorari.

KNAPP, J. The writ in this case brings up for review the conviction of the prosecutor, upon a complaint made by Augustus C. Viger, before Augustus G. Lane, a police justice. The offense charged against him was a violation of the twelfth section of a certain ordinance of the Long Branch commissioners, entitled "An ordinance concerning licenses." The section provides that "no person shall hawk or peddle any merchandise, fish, fruit, or provisions of any description, in the limits of the jurisdiction of this commission, or shall drive any peddler's wagon, cart, or any vehicle used in delivering goods, wares, or merchandise therein, without being licensed by the chairman of this board, as hereinbefore provided, under a penalty of ten dollars for each and every offense."

The first section authorizes the chairman of the commission to "grant, under his hand and seal, to so many and such persons as he shall think proper, licenses to carry on trade or business, or to drive, in the capacity of hucksters, hawkers, and peddlers, within said limits." The fifth section provides that "there shall be charged to each and every person who shall have been a resident within the limits of the jurisdiction of the commission for six months prior to making application for such license, and paid to the city clerk issuing the same, the following sums, to wit: for each and every hawker and peddler, with the privilege of using one peddler's wagon, the sum of three dollars, and for each additional wagon,

the sum of three dollars; for each and every wagon or other vehicle employed or used by dealers or merchants, in the delivery of goods, wares, and merchandise, the sum of two dollars; and that there shall be charged to each and every person who shall not have been a resident within the limits aforesaid, for six months prior to making such application, the following sums: for each and every hawker, huckster, and peddler using one peddler wagon, the sum of ten dollars, and for each additional wagon, the sum of ten dollars; for each and every wagon or other vehicle employed by dealers or merchants, in the delivery of goods, wares, or merchandise, the sum of ten dollars." The remaining portions of the ordinance are devoted to regulating the prices to be charged for hacks and other vehicles, and the conduct and deportment of the drivers. The reasons assigned for reversing the judgment of conviction are not based upon any alleged irregularities in procedure, but are directed against the validity of the ordinance under which the prosecution was had. They are, first, that it is not an ordinance for the regulation of the subjects of which it treats, but one for their taxation when no power is conferred upon the corporation to impose such tax; second, that, regarded as a police regulation, it is unequal and unjust, in that it makes unwarranted discriminations between citizens possessed of equal rights in the pursuit of the same legitimate business. The prosecutor was not a resident within the territorial jurisdiction of the Long Branch commissioners, and had refused to pay a license, as required by the said ordinance, and the conviction in his case, was a proper one, if the ordinance is valid.

"The Long Branch Commissioners" was created a corporation, by act of the legislature, in 1867, and took certain special powers of control over this summer resort. Since then, its powers have been enlarged by various supplements, some ten or more in number. The latest supplement was passed in 1875. The power is claimed under it to establish the ordinance in question. The thirty-third and thirty-fourth sections of the last-mentioned act give power of regulation and control over a large number of specially-named subjects, and authorize provision by ordinance, by-laws, etc., for the general welfare of the town. No express warrant is given by the charter to require a license to be taken out by persons pursuing the business of the prosecutor.

Conceding, as both sides in this case seem to do, that either under these acts or in virtue of the ordinary powers of local government belonging to such corporations, through which it may adopt rules and regulations proper for the good government of the municipality, the business of such persons may be regulated and controlled without express authority so to do, and conceding that requiring a license, as a condition to the pursuit of the business, is an appropriate method of regulating its prosecution, it is a right of regulation merely, belonging to that branch of municipal government known as its police power. Authority under a charter, to pass by-laws and ordinances to license,

control, regulate, or prohibit a business or traffic, within a municipality gives no power to impose a tax for revenue purposes. The powers are essentially different and distinct. They may be unitedly exercised, if such appears to be the legislative will, but between them there is no necessary or legal connection. *Freeholders of Essex v. Barber*, 2 Halst. 64. In the recent case of *North Hudson Co. Railway v. Hoboken*, 12 Vroom, 71, where this question received full consideration, and many authorities are collected, Mr. Justice Depue remarks upon the almost entire unanimity of the courts, in denial of the ability of municipal governments to use the power of licensing as a revenue measure, unless a legislative intent is manifested that such power may be used for that purpose.

Is, then, the ordinance in question, so far as it relates to the prosecutor and those persons of like employment, a matter of local police, or is it an exercise of the power of taxation for revenue? If the latter, it is void and inefficacious to maintain this conviction. That there is no legislative authority given to the corporation to impose a tax upon this or any other sort of trade, is clearly discoverable, upon an examination of its charter provisions; they contain no such grant of power. When the grant is not made for revenue, but for regulation merely, a fee for license may be exacted, but it should not exceed the necessary or proper expense of issuing the license. The fee must necessarily be prescribed in advance, and must therefore be based upon estimation. The fact that the license fee is payable into the treasury of the municipality, provided the fee be a reasonable one, does not impress it with the character of a tax. *Johnson v. Philadelphia*, 6 Penn. St. 445.

It may not be easy, in every case, to determine with precision, from the amount of the fee charged, whether it is intended as a regulation or a tax, and all reasonable intendment should be in favor of its fairness and justness as a fee. A license fee of three dollars for hucksters, hawkers, and peddlers, under the ordinance, is demanded of persons who have resided for six months within the municipality. Assuming this to be a reasonable fee for one so residing in the town, upon what principle can a charge of ten dollars against one who has not resided there for six months, or who resides outside of its limits, be demanded as a license fee? What circumstances incident to the one can subject the public officers to greater burden or trouble in considering and granting the license, than those belonging to the other? Again it may be asked, Why should the use of each additional wagon by him so licensed call for an additional license fee? It could not be charged for the use of the public streets; that would be a road tax, imposed not in a manner authorized by law. If a license fee of three dollars is adequate indemnity to the town for the costs of issuing the license, in the case of the six months' resident, I can conceive of no circumstance that makes it inadequate indemnity in the other case. In *Kipp v. City of Paterson*, 2 Dutcher, 298, under authority in the charter of the city to

pass ordinances regulating its general police, an ordinance passed exacting a fee of five cents for each use of the public streets of Paterson, to sell hay, wood, or country produce, or other articles usually sold in open market, was held to be unreasonable as a regulation, and illegal, because it was a tax. In *State v. City of Hoboken*, 4 Vroom, 280, it was held that, under a charter giving authority to the common council to regulate the building of vaults, an ordinance requiring owners of lands to obtain permits for the erection of vaults in front of their premises, in the streets, and requiring payments therefor, graduated by the area of the vaults, was not a police regulation, but a tax upon the owners of the lands.

It is difficult to escape the conclusion, I think, drawn from the whole tenor of this part of the ordinance, that its purpose is to tax these occupations for the benefit of the treasury. It is irreconcilable with any other theory. By-laws or rules directing the manner of using the public streets by such persons, prohibiting the use of horns or bells in the public streets, or the public outcry of vendors, and restrictions of like character, are properly regulations. And when authority is given to require the possession of a license, as a condition for selling, a reasonable fee, to cover probable expenses, can be demanded. But the exaction of sums in excess of such expenses, and graduated by the amount of business done, can be nothing else than a tax upon such business. I think this ordinance, so far as it affects the prosecutor and those of his class, is void, as one having for its leading purpose taxation for revenue. . . .

No consideration has been given to the question whether, under the powers granted to this municipality, it derives any authority to require or grant licenses, in this business, or exact license fees. The question has not been discussed in the brief of counsel or embraced in the reasons filed, but it may be remarked that all its authority in this regard must rest in warrant from the State. I think the tenor of the cases is to the effect that power to license must come by direct grant, and cannot be taken by implication. *Cooley on Tax.*, 408. So much of the ordinance as applies to the prosecutor is illegal and void, and the judgment against him must be reversed.¹

¹ The following opinion by VANDERBURGH, J., quoted from *City of Mankato v. Fowler*, 32 Minn. 364, is instructive:

"The authority to exact a license from auctioneers is found in chapter 4, section 3, of the city charter (Sp. Laws 1868, ch. 27), wherein it is provided that the council may pass ordinances for the government and good order of the city, etc., and, among other things, to license and regulate theatrical performances, exhibitions, billiard-tables, tavern-keepers, and to grant licenses to and regulate auctions and auctioneers. This authority clearly appears to be granted to the council to be exercised for police purposes, and by police regulations; and we find nothing in the charter empowering the council to tax this particular business, or to impose any other or further restrictions or burdens upon it than authorized by the provision above referred to. The authority to exercise such powers must affirmatively appear in the charter. They are not to be taken by intendment or implication merely. *City of St. Paul v. Traeger*, 25 Minn. 248.

"The plain purpose of the charter provision quoted is to authorize the council to control and regulate the business by means of the license and the fee; the general purpose being to promote order, to protect buyers from imposition, etc., and not to suppress the business or raise revenue. The fact, however, that the city derives a

See LRAN. Licenses. II. General
 Pto extend license for tax & p beyond corp limits 15 Lns 294
 R. 1918 C 528

Pass interurban vehicles used for hire L. 1918 B 881

4. *Conferring or Reserving Executive Discretion**In re WILSON* *

32 Minn. 145. 1884

PETITION for a writ of *certiorari* to the mayor, city clerk, and city council of Minneapolis, to review the ordinance and proceedings by which it was attempted to establish "patrol districts," outside of which no licenses to sell liquor should be granted, and under color whereof the petitioner's application for a license was denied.

The ordinance, after providing that no person shall sell liquors in the city without having obtained a license in the manner therein prescribed, under penalty, enacts that no person shall be licensed "who intends, if licensed, to carry on his business, or who will, when licensed, carry on his business, outside of those districts in said city which shall hereafter be designated and known as 'active patrol districts,' to be designated as hereinafter required." Section 9 reads as follows: "The mayor of said city shall designate such portions of said city as he shall deem best, to be known and designated as 'active patrol districts,' and shall submit the same to the city council for its approval; and, when approved by said city council, the same shall be and become the districts of said city which shall be constantly patrolled by the police force of said city, under the instructions of said mayor. Said active patrol districts may be changed at any time by said mayor, by the like approval of said city council."

The city charter grants to the city council power to pass "all such ordinances for the government and good order of the city, for the suppression of vice and intemperance, and for the prevention of crime, as it shall deem expedient;" and for these purposes "to license and regulate" (among others) "all persons vending, dealing in, or disposing of spirituous, vinous, fermented, or malt liquors."

revenue incidentally from the reasonable exercise of the police power in regulating and controlling the business, is no serious objection to such an ordinance. *City of St. Paul v. Colter*, 12 Minn. 16 (41). What is a reasonable license fee must depend largely upon the sound discretion of the city council, having reference to all the circumstances and necessities of the case. The general rule is that a reasonable license fee should be intended to cover the expense of issuing it, the services of officers, and other expenses directly or indirectly imposed. Unless, however, the amount is manifestly unreasonable, in view of its purpose as a regulation, the court will not adjudge it a tax. See 2 Am. Eng. Corp. Cases, 29; *Van Hook v. City of Selma*, 70 Ala. 361; *Van Baalen v. People*, 40 Mich. 258; 36 Am. Rep. 522, note.

"In respect to exhibitions, amusements, etc., a larger discretion on the part of the municipal corporation is recognized than in the case of trades and useful occupations, and the rule has, of course, a still broader application where the business is such as is liable to degenerate into a nuisance, or such as tends to promote disorder or crime. But the business of an auctioneer is a lawful and useful one, and there would seem to be no reasonable warrant, from its nature or the expenses that might be directly or indirectly incurred in regulating it, for exacting so large a sum [\$300] as a license fee, the result of which, it appears, is not to regulate but to suppress such business. In view of the facts found, we think the trial court was warranted in holding the ordinance unreasonable as a regulation, and unauthorized as a tax."

622 Rejected
50 200, 100, 100

Another section of the charter is as follows: "All ordinances and resolutions of the city council shall be passed by an affirmative vote of a majority of all the members of the council by ayes and nays, which shall be entered on the records of the council. No ordinance shall be passed at the same meeting of the council at which it shall have been presented, except by unanimous consent of all the members present, which shall be noted in the record. . . . When approved, they shall be recorded by the city clerk in books provided for that purpose; and, before they shall be in force, they shall be published in the official paper of the city."

After the passage of the ordinance, the mayor designated certain portions of the city as "active patrol districts," and the council approved the designation by resolution. The petition sets out these proceedings, and alleges that petitioner is engaged in the business of selling liquors, that he applied for a license, but was refused because his place of business is situated outside of the districts designated by the mayor.

Gordon E. Cole, E. M. Wilson, and P. M. Babcock, for petitioner.
Judson N. Cross and Frank H. Carleton, for respondent.

MITCHELL, J. . . . If a writ of *certiorari* would lie in such a case, and the validity of this ordinance were properly before us, there is one, and only one, objection here made to it, which, as at present advised, we would hold well taken.

We have no doubt whatever of the power of the city council to determine where, and within what portions of the city, the business of selling and dealing in intoxicating liquors may be carried on. This right is implied and included in the power to *regulate*. . . .

But this power to regulate is vested in the city council. It is a power which they cannot delegate to any person or officer. It is a legislative act, which they must perform themselves, and they can only exercise it by ordinance, enacted in the manner prescribed in the charter. Of course, they may impose mere executive or ministerial duties, such as approving the bond, receiving the license fee, and issuing the license, on certain officers, as they have done in the present case; these are mere executive and ministerial acts to be performed in the execution of the ordinance. But they cannot delegate their legislative powers. The ordinance, in that respect, must be complete when it leaves the hands of the city council. The limits within which the sale of liquor should be confined is a matter which the council must determine for themselves. It calls for the exercise of legislative discretion. They can no more remit to the mayor the right to determine this than they can the question of the amount of the license fee.

But this is, in effect, what they have done in this case. The ordinance nowhere defines the limits of the "license districts." It leaves this to be done by the mayor, under the name of "active patrol districts," which is but another name for license districts. The matter is some-

what obscured by calling them "active patrol districts." But when the ordinance is stripped of all disguises, the stubborn fact remains that it is the judgment and discretion of the mayor, and not of the council, which is to determine in what parts of the city this business may be carried on. The difficulty is not obviated by the fact that the action of the mayor is to be approved by the council. This may be done by a mere resolution, passed by a bare majority of a quorum, at the same meeting at which it is introduced; whereas the council can only legislate on this subject by ordinance, passed in the manner prescribed by section 9, chapter 4, of the charter already quoted. This ordinance carries with it the seeds of its own dissolution; for, under the last clause of section 9, the mayor might at any time, with the approval of a bare majority of a quorum of the council, extend the license district so as to include the whole city. In legislating upon this question, it is, of course, eminently proper that the council should take into account what parts of the city can conveniently be patrolled by the police; but, after all this, they must themselves exercise their legislative discretion in fixing the limits of the license districts. . . .

Counsel were allowed, upon the argument, to discuss the validity of this ordinance at great length. Both sides were desirous that this question should be now passed upon, in view of its importance, and the serious public evils and embarrassments that might result from its being left in doubt. For these reasons we have expressed our views upon what may be termed the special distinguishing features of this ordinance, although we have concluded that a *writ of certiorari* will not lie in this case. . . .

Writ denied.

HYDES *et al.* v. JOYES *

4 Bush (Ky.), 464. 1868

THIS action was brought by assignees of a contractor, to recover judgment for the sale of defendant's property, to pay an assessment for grading and paving a sidewalk in a street of the city of Louisville upon which defendant owned abutting property.

The charter of the city provides that "said general council may pass ordinances to procure the grading, paving, curbing, and furnishing with metal gutters, or regrading, repaving, recurbing, and furnishing with metal gutters, the whole or any portion, in width or length, of the sidewalks on any square or squares, or portions of a square, within the city limits, or such one or more of said modes of improvement thereof as the said council may direct or authorize to be done, and at the cost of the owner of property fronting on such sidewalks, and to be apportioned

according to the amount actually done in front of such property, or parts of property; and for such costs a lien is hereby created against such property or parts of property."

Under this clause, an ordinance of the council was passed which ordains "That the sidewalks on the west side of Fulton Street, between Market Street and Water Street, or such portions of said sidewalks as the city engineer may direct, be graded and paved at the costs of the owners of property binding thereon; said work to be done subject to the supervision and control of the city engineer, and in accordance with specifications to be furnished by him," etc.

Plaintiffs set out the ordinance, the contract made thereunder, and the assessment by the council. A demurrer was sustained, and the plaintiffs appealed.

R. J. Elliott and C. A. Gill, for appellants.

P. Joyes, for appellee.

WILLIAMS, C. J. . . . The two branches of the city council alone can determine the necessity of the improvement, as well as its kind and character, and this upon a call of ayes and nays. Nowhere in the original charter, or the amendments, is there any authority to refer to any other body or person the determination of these things; because, as recently held by the Supreme Court of Missouri, in *Ruggles & Baxter v. S. A. Collier*, this power to pass ordinances for improving streets, etc., is legislative, and cannot be delegated. It is also in effect a power of taxation, which is the exercise of sovereign authority, and nothing but the most explicit language can justify a court in holding that the legislature intended to confer such vast power over the citizens' property upon the mere discretion of any single officer, much less a simple ministerial one. Nor can, as held in said case, the subsequent acts of affirmation by the council vitalize or validate a lifeless or invalid ordinance — one conferring no legal authority to make and let the improvements when put under contract.

The property-owners are not only interested in the improvements, but also in the kind and character thereof, including the grade and materials and width of pavement, etc.; therefore, they have the legal right to have these things passed on by the city legislature, the members of which are responsible to their constituency for all measures of oppression or neglect.

Pavement signifies to floor with stone, brick, or other hard substance, involving great difference of price as well as durability, and requiring the exercise of sound judgment to determine the economy of the one rather than the other, as the lowest in price might be the dearest to the owner, because of its want of durability. So one grade might be proper and economical, whilst another would be injurious and wasteful. . . .

To ordain, generally, that a street or square should be graded and paved, or so much thereof as the engineer might direct, and according

to specifications to be furnished by him, is simply to delegate to him the power to fix the grade, determine what materials should be used for the pavement, and how much of the street or square should be thus improved, and is not the determination of the council as to any of these things, but rather a general and unlimited letter of attorney to the engineer to have so much of a square or street as he may deem proper improved, in a manner to his own liking. To allow such an ordinance to bind the property-holder is to destroy all the safeguards thrown around him by law. Suppose, under the plenary power conferred by this ordinance, the engineer had determined that one portion of the square should be of one grade and the remainder of another, and thereby injure the owners of the lots; or had he determined one portion should be paved with brick, another with stone, and a third with plank or some other hard substance, who could say he was transcending his authority? Yet, had such been proposed to the council, it would likely have been unanimously rejected. Extreme as this may seem, yet it elucidates the possible wrong such ordinances may inflict upon the owners, and the great departure it would be from what the law contemplates as an ordinance.

It is as imperative on the council to ascertain what portion of a square needs improvement, when all does not need it, as it is to ascertain when a whole square needs it, and also as imperative to fix the character and quality of the work to be done on a part, as the whole of a square. We do not say that when a portion or all of a square needs improvement, and the council has ascertained these facts, and designated the grade and kind of improvement, that, in carrying out the general plan and outline of the improvement so designated, the engineer may not be vested with the power to vary so as to make the work practically subserve the purposes of the general scope of the ordinance as developments may determine; but what we do say is, that the council must determine the portion of the street or square, the grade and kind of pavements, and not authorize the engineer to ascertain and carry out these things without the approval of the council by ordinance.

If the report of the engineer in fixing the grade, designating the portion, and recommending the kind of pavement to the council, should be injurious or oppressive to the property-holder, he would have the right to present his objections to the council before its final determination, and defeat the enactment of the ordinance; and though he may often not be informed even of these, and therefore lose the opportunity to be heard, yet this only the more clearly shows that the council should certainly know what kind of improvements are to be made, as otherwise the property-holder would lose both the right to protect himself in person or by his representative in the council; hence it should be the more clearly informed before he is bound. . . .

Wherefore, the judgment is affirmed; JUDGE ROBERTSON non-concurring.

OULD *et al.* v. CITY OF RICHMOND

23 Gratt. (Va.) 464. 1873

THIS was an action of *assumpsit* in the Circuit Court of the city of Richmond, instituted in November, 1871, by Ould & Carrington, lawyers, against the city of Richmond. The object of the suit was to test the validity of the ordinance of the city council, imposing a tax on lawyers. Issue was made up on the plea of *non assumpsit* and the whole matter of law and fact was submitted to the decision of the court.

The power of taxation vested by the charter in the council is stated in the opinion. By the ordinance imposing taxes, persons following various employments in the city were classified, and a specified tax was imposed on each class. Among these were lawyers, who were divided into six classes. The eleventh section of the ordinance provides — "that the committee on finance shall place each person and firm employed in the trade or business referred to in sections three, four, five, seven, and eight, in the class to which the committee shall be of opinion such person or firm properly belongs, looking to all the circumstances of the case." And it was directed that when the committee had completed their classification, they should give notice of the fact by publication in two of the papers of the city, and that the committee would meet at a specified time to hear any application for a correction of the classification; and in the meantime the list was left in the auditor's office, open for the examination of all persons interested in the matter.

In 1871 the committee of finance placed the plaintiffs, as lawyers, in the first class, and classified all lawyers practising in the city in the respective classes mentioned in § 5 of the ordinance; that being the section in reference to lawyers. In doing so the committee had no assessment of the plaintiffs' income from their profession before them; nor did the committee ascertain, or attempt to ascertain, their incomes in any way; but formed its own estimate, without evidence, of the reputation and standing of the lawyers practicing law in the city of Richmond, including the plaintiffs, and their supposed capacity to make profits in that way, relatively with each other; and classified them accordingly. The committee made no report to the council of their action in the premises; nor did the council ever revise or consider it in any way; but an opportunity was offered to all the lawyers to show, each for himself, that they had been taxed too high in the manner provided in the eleventh section of the ordinance; and some of them availed themselves of that opportunity; and among them the plaintiffs, whose tax was reduced from one hundred and fifty to one hundred dollars; but in doing so the committee acted without evi-

dence of the relative incomes of the lawyers embraced in the classification. The plaintiffs having paid the tax under protest, after the officer had levied upon their property, brought this action to recover it back.

Upon the hearing of the case there was a judgment for the plaintiffs; and the city of Richmond, having taken an exception to the opinion and judgment of the court, applied to this court for a *supersedeas* which was awarded.

Meredith, for the appellant.

Wm. Green and *R. T. Daniel*, for the appellees.

ANDERSON, J. [After deciding that the city had, under its charter, power to tax lawyers.]

That the power of taxation is an important and delicate trust confided to the council, and cannot be delegated by them to a committee of their own body, or to any other agency, is unquestionably true. It is a legislative power; and when granted to a municipality, it can only be executed by itself, or by such agencies or officers as the statute has pointed out. So far as its functions are legislative, it rests in the discretion and judgment of the municipal body entrusted with it; and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates, or of any other authority. Cooley, pp. 204, 205, and cases cited.

But, was the assignment of the lawyers to their respective classes a legislative function? The enactment that the lawyers should be divided into six classes, and that a tax of so much should be levied upon each individual of a class, was legislative, and was performed by the council itself. Was the inquiry as to which class the lawyers should be respectively assigned, and the assignment of them to their respective classes, a legislative or a ministerial act? If it is a legislative function, the commissioners of the revenue, under a delegated authority from the general assembly, have been performing yearly, without question, legislative functions. It is a service which could not be well performed by the legislative body. It is the function of a commissioner, in order to the execution of a legislative act, and is ministerial; and it seems to me, that it was competent for the council to require the service to be performed by a committee of their own body, as well as by a commissioner, or the general assessor. And it was not more necessary that the action of said committee should be reported to the council, and have its confirmation, than that similar duties by a commissioner of the revenue should be reported to and confirmed by the legislature of the State. But the taxpayer should be provided with ample remedies for redress, if he has been aggrieved by the action of the committee. Whether the remedy provided in this case by the ordinance of the council is adequate or not, there is no complaint by the appellees that any injustice has been shown to them; and it is a question, it seems to me, for the council and their constituents, and does not come within the province of the courts.

It is objected, also, that the mode of ascertaining the class to which the lawyers should be respectively assigned, was uncertain and wholly inadequate to the attainment of justice, and vitiates the whole proceeding. If it be an income tax, as is contended it was designed to be, an assessment was necessary to ascertain what was the income of the lawyer to be taxed. And if it was not an income tax, but a license tax, that is, a tax on the civil right or privilege conferred by the license, the tax ought to be proportioned, as nearly as practicable, to the value of that right and privilege. But exact justice and equality are not attainable, and consequently not required. *Cooley, Const. Lim.*; *Slaughter's Case*, 13 Gratt. 767; *Eyre v. Jacob, sheriff*, 14 Gratt. 422, 434, 435; *Gilkeson v. Frederick, Justices*, 13 Gratt. 577.

I do not think it was intended to be a tax on income. The classification of the lawyers shows this. It was intended to be a tax on the civil right and privilege. And it is true that the tax ought to be proportioned, as nearly as practicable, as I have said, to the value of the privilege. . . .

Now while it is not expressed that the classification shall be made with reference to the value of the civil right or privilege conferred by the license, that, it seems to me, is the obvious design and object of the classification, and would be so understood. . . .

I do not think that the city council have exceeded their powers in the imposition of this tax. I am, therefore, of opinion, to reverse the judgment of the court below.

MONCURE, P., and CHRISTIAN, J., concurred in the opinion of ANDERSON, J.

STAPLES and BOULDIN, JJ., dissented.

Judgment reversed.

STATE v. TENANT *

110 N. C. 609. 1892

INDICTMENT for violating a city ordinance, tried at the October Term, 1891, of the Criminal Court of Buncombe County, after an appeal from the judgment of the mayor of the city of Asheville.

The jury returned a special verdict, wherein they found substantially the following facts:

A city ordinance of the city of Asheville provides, "That no person, firm or corporation shall build or erect within the limits of the city any house or building of any kind or character, or otherwise add to, build upon or generally improve or change any house or building, without having first applied to the aldermen and obtained a permis-

sion for such purpose." On May 15, 1891, the Asheville Mission Hospital, a corporation conducting a hospital in Asheville for sick and destitute persons, applied to the aldermen for permission to erect an additional hospital building on its land. A number of citizens petitioned the aldermen not to grant the permission. A committee of the board was appointed to investigate the matter, and finally the board refused the permission, without assigning any reason therefor. After such refusal the defendant commenced work on the building and prosecuted it for some time, under a contract previously made by him with the hospital. On August 28, 1891, the aldermen passed another ordinance prohibiting any person from constructing or encouraging or aiding in the construction of any building for which no permit had been granted by the city, after notice from the chief of police, under penalty of a fine of \$50. The defendant was notified under this ordinance, but continued the work until arrested. The by-laws of the Mission Hospital contained the provision mentioned in the opinion of the court.

The county court being of opinion that the ordinances were valid and constitutional adjudged defendant guilty, and that he pay a fine of \$50 and costs. Defendant appealed.

The Attorney General and Mr. T. H. Cobb, for the State.

Messrs. W. W. Jones and F. A. Soundley, for defendant.

AVERY, J. The legislature is empowered under the organic law to restrict an individual by direct enactment in the exercise of such dominion and control over his own house or premises, as may result in injury to others, provided the prohibitory or restraining statute does not upon its face discriminate in favor of one person or class of persons over others. And, though the law-making power can unquestionably create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the Constitution prohibits the creator from doing. *Cooley, Const. Lim.* (4th ed.), 198; *Weith v. Wilmington*, 68 N. C. 24. Police power may be exercised by the sovereign State through the General Assembly in derogation of the absolute right of the individual only for the general benefit, and by means of statutory provisions that upon their face operate indiscriminately upon, and are enforceable by, the same species of process against all persons and classes. *State v. Moore*, 104 N. C. 721; *State v. Chambers*, 93 N. C. 600; *State v. Stovall*, 103 N. C. 416; *Diset v. West Virginia*, 129 U. S. Rep. 114; *Mogler v. Kansas*, 123 U. S. Rep. 623. "Towns and cities cannot use their power to create monopolies for the benefit of private individuals, nor can they pass by-laws imposing penalties that do not operate equally upon all citizens of the State who may come or live within the corporate limits." *State v. Pendergrass*, 106 N. C. 664; *State v. Summerfield*, 107 N. C. 898; 1 *Dillon*, § 380 (313).

It is equally clear, that if an ordinance is passed by a municipal cor-

poration, which, upon its face, restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action and leaves the right of property subject to the despotic will of aldermen who may exercise it so as to give exclusive profits or privileges to particular persons. *Newton v. Belger*, 143 Mass. 598; *City of Richmond v. Dudley*, Northern Reporter, vol. 28, No. 13, p. 312; *Yick Wo*, 118 U. S. Rep. 356; *May v. People*, 27 Pacific Rep. 1010; *Baltimore v. Radecke*, 49 Md. 217; *Anderson v. City of Wellington*, 40 Kas. 173; *In re Frazee*, 63 Mich. 396; *Tugman v. Chicago*, 78 Ill. 405; *Village of Braceville v. Doherty*, 30 Ill. App. 645; *Barthel v. City of New Orleans*, 564; *Bills v. City of Goshen*, 117 Ind. 221; *Lake View v. Lutz*, 44 Ill. 81; *Horr & Bemis on Mun. Police Ordinances*, sec. 13; *Evansville v. Martin*, 41 Ind. 145.

The first ordinance relied upon to support the indictment provides: "That no person, firm or corporation shall build or erect within the limits of the city of Asheville . . . any building of any kind or character, or otherwise add to, build upon, or generally improve or change any building, without having first applied to the aldermen and obtained a permission for such purpose." Whether the landowner proposes to erect on his premises a storehouse, opera house, dwelling, stable, kitchen, hen-house, and whether he proposes to use fire-proof or combustible material in the structure, he is required to apply to the aldermen of Asheville for a permit, and if the ordinance is valid he incurs liability for violation of it the moment he begins the work of building. Moreover, if he should add a porch, a tower, or improve by digging a cellar the dwelling-house occupied by him, he would subject himself to like danger, though he should use no material in making the improvement not generally considered fire-proof. But while the right to prohibit the erection of a building without regard to the material to be used in constructing it, has been held unreasonable, the most objectionable feature of the ordinance is the reservation by the aldermen of the right to refuse the application of one landowner and grant that of another, arbitrarily and despotically, when, for all material purposes, the two apply for precisely the same privilege.

We concede that the constitutionality of an ordinance prohibiting the erection of wooden buildings, or buildings with wooden or shingle roofs, in the thickly settled portions of towns, and requiring a license before beginning to build such structures, has been usually, if not universally, sustained where the ordinance laid down a general rule that precluded the possibility of discrimination and favoritism in granting the license so as to limit the privilege to certain persons. *Codes v. Miller*, 33 Am. Rep. 330; *Tiedman on Police Power*, 439, 440.

We admit, also, that there are authorities which maintain the doctrine that even where contracts have been made with builders for the erection of such wooden buildings, before the passage of a valid ordinance, the builder is considered as having entered into the contract, subject to the right of the municipality to enact a prohibitory by-law and annul his contract at any time before he begins to build and expend money, that he may lose, if prohibited from finishing. *Knoxville v. Bird*, 12 Lea (Tenn.), 121.

In *Yick Wo v. Hopkins*, 118 U. S. Rep. 356, the court held that it was a violation of the Fourteenth Amendment (in withholding the equal protection of the law) to pass and enforce ordinances in the city of San Francisco, which forbade persons to erect scaffolds on roofs, or carry on laundries in that city, without license or the consent of the supervisors, because it conferred upon the municipal authorities arbitrary power, at their will and without regard to the competency of the person applying, or the propriety of the place selected for carrying on the business. No matter, therefore, if the circumstances of a particular case were such that an applicant seemed about to create a nuisance, he could not be punished under a void ordinance, or one which prescribed no rule for the exercise of discretion on the part of city aldermen in restricting persons in the enjoyment of their rights of property or person. *State v. Webber*, 107 N. C. 962; *State v. Hunter*, 106 N. C. 796.

In the case of *Newton v. Belger*, *supra*, not only is the same principle enunciated, but the ordinance is almost identical with that under consideration in the case at bar. The prohibiting portion was as follows: "No person shall erect, alter, rebuild or essentially change any building or any part thereof, for any purpose other than a dwelling-house, without first obtaining, in writing, a permit from the Board of Aldermen." The court said: "It does not merely forbid the erection of any building which is hazardous, and which exposes other persons or property to danger. . . . On the contrary, it gives them the power, by refusing a permit, to prevent the erection of any building, except a dwelling-house, for any reason which may be satisfactory to them. Under the ordinances they may refuse a permit, because, in their opinion, it is desirable that certain parts of the city shall be used for handsome dwelling-houses, and that all buildings for the purpose of trade, shall be excluded, though, in no sense, dangerous. . . . What is there in the ordinance under consideration to prevent the aldermen, if they were so inclined, from prohibiting the construction of any houses, in a defined boundary, except costly dwellings, and thereby enhancing the value of the property, in which they have a personal interest? We have no idea that any such purpose exists, but we cannot sanction the enforcement of an ordinance by means of which the aldermen may at any time, not only entertain, but act upon, such an improper motive."

Upon the principle which we have announced, an ordinance fixing

the amount of city tax on theaters, roller-skating rinks, etc., at such sum of money, as the council should determine in each particular case, was held void, because it gave power to discriminate "between persons engaged in like business." *Bills v. City of Goshen, supra*. An ordinance aimed at the Salvation Army, which forbade any persons or society to parade a street, singing or beating drums, etc., without having first obtained the consent, in writing, of the mayor, or, in his absence, of the president of the city council, was declared void upon the same ground. *Anderson v. City of Wellington, supra*.

In *Horr & Bemis, supra*, sec. 263, the rule as to the proper form of ordinances in reference to granting licenses is laid down as follows: "As has already been stated, no discretionary powers should be vested in officers whose duty it is to execute the provisions of ordinances, and the rule is applicable to this class of ordinances. The ordinance itself should specify every condition of the license, and the officer should be merely entrusted with the duty of issuing licenses to all who comply with the prescribed conditions." In *State v. Hunter, supra*, this court held an ordinance unconstitutional because it clothed a policeman with an arbitrary discretion to determine what was a reasonable time to wait for persons to move off the sidewalk before making an arrest.

The case of *State v. Yopp*, 97 N. C. 477, stands upon a very different principle. While the legislature has no right to enact a law forbidding all men in a certain section from building houses of any kind on their own land, it unquestionably is empowered to forbid riding bicycles on a particular road or street altogether, because the lives of other persons and the safety of the property of others are imperiled by their use on account of the danger of frightening horses attached to vehicles. *Sic utere tuo ut non alienum laedas*. Having power to prohibit bicycles on the road entirely, the legislature had the same power to authorize a person or tribunal to grant a license, when the road should be clear of vehicles, that it has to provide for licensing the sale of spirituous liquors.

"Where the nuisance consists, not in the building itself, but in the use to which it is put, the building cannot be destroyed." *Tiedman, supra*, 441. "If a house is used for the purpose of a trade or business by which the health of the public is endangered, the nuisance may be abated by removing whatsoever may be necessary to prevent the exercise of such trade or business." *Ibid*. The same principle must necessarily apply to construction as to destruction of buildings on account of health. So that if the ordinance, instead of being void for want of a rule governing the exercise of discretion by aldermen, had provided in plain terms that no person or corporation should be allowed to erect a building without a license at any point within the city, if it were understood that the person or corporation proposed to use the house for a hospital for the infirm or sick, and that the same individual

or corporation had admitted a patient suffering from typhoid fever into a hospital under their management on another portion of the same lot, the ordinance would have allowed an unreasonable interference with the rights of landowners, because it is not necessary, in order to protect health, to prohibit a person from building a house according to any plan on his own land, but the end may be reached by prohibiting the reception of patients who are suffering from infectious or contagious diseases. The act incorporating the Asheville Mission Hospital, with which the defendant contracted to build, empowered the corporation to erect one or more hospitals "for unfortunate and destitute persons," and invested it with authority to make by-laws, etc. Private Laws of 1891, ch. 306, §§ 3 and 4. So that the officers might, while the building was in the course of erection, have enacted a by-law providing that only aged and infirm persons who were destitute should be admitted. Instead of using their authority to prevent the spread of disease, the ordinance leaves it in the power of unprincipled officers to locate hospitals entirely with a view to enhancing the value of certain property. The erection of the hospital in a section where there were only tenement houses might enhance values of property in the vicinity, while if located in a more fashionable quarter it might be considered an eye-sore.

It seems, however, that the corporation, in the case at bar, have already a building on the same lot, which had been used as a hospital, and had asked a permit to add another, and thereby furnish additional accommodation for the sick, and had passed a by-law forbidding the reception of patients suffering from contagious or infectious diseases, except by special arrangement with the managers, under the advice of the physician. But cases of typhoid fever had been admitted to that hospital. We do not know, judicially, whether that disease is infectious or not; but if the city, instead of the Mission Hospital, will enact just such a prohibitory by-law applicable to all hospitals within the corporate limits, that question can be determined in the appointed way. *Arkadelphia v. Clark*, 27 Am. and Eng. Corp. Cases, 586. After the license to build was refused, the work of building was commenced and prosecuted for some time under a contract previously made by the defendant with the Mission Hospital. Subsequently (August 28, 1891), the ordinance providing that a further prosecution of such work, after notice, should subject all mechanics, contractors, etc., to a penalty, was passed, and the warrant, which charges specifically a violation of the said ordinance of August 28, 1891, was issued on October 5, 1891. If it be conceded that the first ordinance was void because it prescribed no general rule for the exercise of discretion in granting permits, the ordinance passed after the contractor had expended money in disregard of the void by-law, and providing simply that all persons engaged in erecting such building should be subject to a penalty for failure of the owner of the property to get a permit under the old

arbitrary law, would be subject to the same objection, if not to others equally as fatal to its enforcement against the defendant.

There was error in the ruling of the court that the defendant was guilty, and a new trial must be granted.

5. *Restricting the Future Exercise of Discretion*

BRICK PRESBYTERIAN CHURCH v. MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK

5 Cowen (N. Y.), 538. 1826

SAVAGE, C. J. This action is brought for an alleged breach of the covenant for quiet enjoyment. On the 25th of February, 1766, the defendants conveyed to those whom the plaintiffs represent, the premises on which the brick Presbyterian church now stands, in the city of New York. By the deed, the lessees covenanted for the payment of an annual rent, and also that, within ten years, the premises should be enclosed in a fence; and that a church should be built thereon, or the premises should be used as a cemetery; and also that they should never be used for private secular uses. The defendants then covenanted, that the lessees and their assigns, paying the rent and performing the conditions, should quietly use, occupy, and enjoy the premises, without any let or hindrance of the defendants or any other person, etc.

The plaintiffs aver performance on their part, and a breach of the covenant on the part of the defendants, by reason of their by-law of the 27th of October, 1823, prohibiting the use of the premises, as a cemetery, for the interment of the dead.

The defendants, by plea, justify under their charter of incorporation, and the act of the legislature of the State (2 R. L. 445, § 267) by which they have full power and authority to make and pass such by-laws and ordinances as they shall, from time to time, deem necessary and proper, "for regulating, or if they find it necessary, preventing the interment of the dead within the said city." To this plea the plaintiffs have demurred.

The principal question, and the only one which it is necessary to decide, is, whether the by-law of October, 1823, is *per se* a violation of the covenant for quiet enjoyment contained in the deed of the 25th February, 1766, for which the defendants are liable to pay damages. The validity of the by-law is asserted by both parties. We are relieved, therefore, from any inquiry on that point.

The defendants are a corporation and in that capacity are authorized by their charter, and by law, to purchase and hold, sell, and convey real

estate, in the same manner as individuals. They are considered a person in law within the scope of their corporate powers; and are subject to the same liabilities, and entitled to the same remedies, for the violation of contracts, as natural persons. They are also clothed, as well by their charter as by subsequent statutes of the State, with legislative powers and, in the capacity of a local legislature, are particularly charged with the care of the public morals, and the public health within their own jurisdiction.

In ascertaining their rights and liabilities as a corporation, or as an individual, we must not consider their legislative character. They had no power as a party, to make a contract which should control or embarrass their legislative powers and duties. Their enactments, in their legislative capacity, are to have the same effect upon their individual acts, as upon those of any other persons, or the public at large, and no other effect.

The liability of the defendants, therefore, upon the covenant in question, must be the same as if it had been entered into by an individual; and the effect of the by-law upon it the same as if that by-law had been an act of the State legislature. It is expressly authorized by the legislature; and whether it be their act or an act of the local city legislature, makes no difference. 4 Wheat. 652.

The plaintiffs, then, are entitled to the same remedy as if the premises had been conveyed to them by an individual, under the like conditions and covenants. This being so, the defendants' proposition is, that the act of the legislature rendering the covenant unlawful, the covenant itself becomes inoperative.

There are but few authorities on this question, and those few are at variance. The case of *Brason v. Dean* (3 Mod. 39), decided in 1683, was a covenant upon a charter party for the freight of a ship. The defendant pleaded that the ship was loaded with French goods prohibited by law to be imported. And, upon demurrer, judgment was given for the plaintiff; for the court were all of opinion, that if the thing to be done was lawful at the time when the defendant entered into the covenant, though it was afterwards prohibited by act of parliament, yet the covenant was binding. But in the case of *Brewster v. Kitchen* (1 Ld. Raym. 317, 321), A. D. 1698, a different, and a more rational doctrine is established. It is there said, "For the difference when an act of parliament will amount to a repeal of a covenant, and when not, is this: when a man covenants not to do a thing which was lawful for him to do, and an act of parliament comes after, and compels him to do it, then the act repeals the covenant, and *vice versa*. But when a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant."

In 1 Salk. 198, where the same case is reported, the proposition is thus stated: "Where H. covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it,

the statute repeals the covenant. So if H covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed. But if a man covenants not to do a thing which then was unlawful, and an act comes and makes it lawful to do it, such act of parliament does not repeal the covenant."

That such is the correct rule, as between individuals, seems to be admitted by the counsel for the plaintiffs. But it is contended that the rule is not applicable to a case, where the same party makes the covenant, and afterwards makes the legislative act, which abrogates the covenant. There is, indeed, a seeming inconsistency; but the solution has already been given, viz., that the defendants had no power to limit their legislative discretion by covenant; and they are not estopped from giving this answer. 2 T. R. 169.

The reasonableness of acting upon the rule, in this case, cannot be more strongly exemplified, than by the case itself. Sixty years ago, when the lease was made, the premises were beyond the inhabited part of the city. They were a common; and bounded on one side by a vineyard. Now they are in the very heart of the city. When the defendants covenanted that the lessees might enjoy the premises for the purpose of burying their dead, it never entered into the contemplation of either party, that the health of the city might require the suspension or abolition of that right. It would be unreasonable in the extreme, to hold that the plaintiffs should be at liberty to endanger not only the lives of such as belong to the corporation of the church, but also those of the citizens generally, because their lease contains a covenant for quiet enjoyment. Suppose these premises had been let for a certain purpose which is proper in itself, in a detached situation, but a nuisance in a city thickly inhabited—for instance a slaughter-house—could it be seriously contended, that when the use of the property in the way contemplated by the parties to the conveyance, was forbidden by the legislature, an action would lie against the grantor? Such a rule, I apprehend, would be extremely oppressive and unjust, as to individuals; and equally so, as to the defendants in this cause.

The defendants are entitled to judgment on the demurrer.

Judgment for the defendants.

STATE *ex rel.* CITY OF ST. PAUL *v.* MINNESOTA TRANSFER
RY. CO.†

80 Minn. 108. 1900

COLLINS, J. Appeal from an order directing that a peremptory writ of mandamus issue, requiring and compelling the defendant transfer railway company to proceed forthwith to repair the bridge described in the pleadings in accordance with certain plans and specifications attached to, and made a part of, the petition for such writ.

The bridge in question is the one now in use upon University Avenue, in the city of St. Paul. It is more than thirteen hundred feet in length, and is an overhead crossing of a large number of defendant's tracks, which have been laid over the avenue at grade, and have been, and now are, in constant use as a part of defendant's system of transfer tracks. The latter are close together, cross the avenue obliquely, and occupy a space of about three hundred fifty feet in width, — a little more than one-third of the length of the bridge. The defendant's land has not far from thirteen hundred feet frontage on the avenue, so that the bridge practically spans the entire tract. An overhead crossing having become necessary, the president of defendant company made a proposition in writing to plaintiff's common council to construct the same of a certain width, and in accordance with plans to be satisfactory to the city engineer. Conditions were imposed upon the city, in the proposition, as follows:

"The city of St. Paul to agree to construct all the necessary approaches on both ends of said bridge, and pay any damages to owners of property abutting on said approaches; and, on the completion of the bridge in accordance with the plans as accepted by the city engineer, the city of St. Paul is to maintain the same for all future time. The city of St. Paul to further agree to prohibit all crossing at grade of tracks of the Minnesota Transfer Railway Company after the said bridge is completed, ready for use; and, in the event that permission is given by said city to any company to construct a motor line, an elevated railroad, or any other railway upon University Avenue across the grounds of the Minnesota Transfer Railway Company, such road shall not be permitted to cross the tracks of the transfer company at grade, but upon a bridge to be constructed at the expense of said elevated railroad or motor line, and in no manner at the expense of the Minnesota Transfer Railway Company; and no permission shall be given any elevated railroad or motor line to build a bridge over the tracks of this company on University Avenue, unless, coupled with such permission, it is required that the bridge be built to conform to that which the Minnesota Transfer Railway Company hereby proposes to build, so far as length of spans and

clearance above the rails of the tracks of the Minnesota Transfer Railway Company are concerned."

In addition, the proposition was made subject to approval by defendant's board of directors. Later the city council instructed, by resolution, the proper officers to enter into a contract with defendant corporation for the construction of the bridge in accordance with the proposition. The bridge was built at an expense of about \$98,000 to defendant, and of about \$25,000 to the city. It was much more of a structure than defendant deemed necessary for public use at the time, but, according to the answer, defendant "participated in the construction thereof, relying upon the good faith of said city and of its officers and common council, and upon the aforesaid acceptance of said proposition and report as a valid and permanently binding agreement of said city to maintain and repair the said bridge for all future time, and at its own sole expense."

And evidently it was much longer than was necessary for the protection of the public when crossing defendant's tracks. It is further averred in the pleading just mentioned that ever since its construction the city has maintained the bridge, and every part, and has made all repairs thereon, except in one instance, where the damages were occasioned by a collision of cars operated by defendant itself. The order for judgment was upon the petition and answer. . . .

The question then is, Was it within the power, express or implied, of the city officials to enter into an agreement of this character which would be of any validity?

Not only did the council appropriate city funds to and in the construction of a bridge which, in so far as it crossed the railway tracks, was made necessary by defendant's acts, and which, as a consequence, defendant was obliged wholly to construct, but it accepted conditions, and attempted to bind the municipality, for all future time, to maintain this bridge at that particular point. Without regard to what might be needed by the public at some future period, the council attempted to bind the city to repair and to keep in existence for all time a bridge but one-half as wide as the avenue across which defendant had laid a large number of tracks, evidently used as part of its transfer yard, and not merely for ordinary crossing purposes. The council went further than this. It attempted to bind the city not to cross the tracks at the surface grade or otherwise, nor to allow any street-car or traction company so to do, or to so cross at any other grade than that fixed by the height of the bridge.

If such a contract could be upheld, the city, without any consideration whatever, and as a gratuity, gave away and waived, as was said by the court below, "a most valued right given to it at common law, viz., the right to compel the respondent to provide and forever maintain suitable and safe crossings on University Avenue over its tracks and other grounds, a distance of over thirteen hundred feet, and it relieved the respondent for all time from any and all obligations in that behalf." Such an arrangement, ignoring entirely the question of consideration,

was *ultra vires*. It was not binding on either party. It cannot be that the common council of 1888, by the passage of a resolution providing for the construction of a bridge sixty feet in width in a street one hundred twenty feet wide, to be perpetually maintained by the city, could limit or control the legislative action of its successors, or could abdicate its right, as future necessity should require, to compel the construction and maintenance of a bridge or viaduct of such dimensions, width, and construction as should, as nearly as may be, restore the street to its former condition of usefulness.

We have already held that the power of municipal authorities to contract in relation to a given matter does not carry with it, by implication, power to make a contract, even with reference to such matter, which shall cede away, control, or embarrass their legislative or governmental powers, or render the municipality unable in the future to control any municipal matter over which it has legislative control (*Flynn v. Little Falls E. & W. Co.*, 74 Minn. 180, 186; *State v. St. Paul City Ry. Co.*, 78 Minn. 331); and also that a municipal corporation intrusted with power of control over public streets cannot, by contract or otherwise, irrevocably surrender any part of such power, without the explicit consent of the legislature, because such power is in the nature of a trust held by the corporation for the State. *Nash v. Lowry*, 37 Minn. 261. And, of course, it is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract. Future conditions may require that the public thoroughfare be restored to its normal condition, so that there may be a grade crossing for all persons who may have occasion to cross on foot or in vehicles. This would compel the defendant's tracks to be put overhead or underneath the surface. And it is not improbable that in time the traveling public may need, for its use, the full width of the avenue, one hundred twenty feet, instead of the sixty feet now accorded. These things would be absolutely prohibited, should we sustain defendant's contention. The alleged contract was and is invalid. . . .

We are of opinion that an agreement on the part of the city to maintain this bridge for all time was beyond the power of the officers of the city, contrary to public policy, void, and of no effect, and that the order of the court below directing a peremptory writ of *mandamus* should be affirmed. It is so ordered.

FLYNN v. LITTLE FALLS ELECTRIC & WATER COMPANY

74 Minn. 180. 1898

ACTION in the district court for Morrison County by plaintiff in behalf of himself and all other taxpayers of defendant city against the city of Little Falls, its mayor, clerk, treasurer, the members of its common council, and the Little Falls Electric & Water Company to enjoin the city and its officers from continuing to carry out the provisions of a certain ordinance. From an order, BAXTER and SEARLE, JJ., sustaining the demurrer of defendant company to the complaint, plaintiff appealed. Reversed.

Calhoun & Bennett, for appellant.

Lindbergh, Blanchard & Lindbergh, for respondent.

MITCHELL, J. The present city of Little Falls was organized first as a village (Sp. Laws 1879, ch. 6), with the power to establish such regulations for the provision and extinguishment of fires as it might deem expedient, and afterwards as a city (Sp. Laws 1889, ch. 8), with power to erect water-works for the supply of water to the city and its inhabitants, or to grant to third parties the right to erect water-works for the same purpose, and to lay water pipes and mains in the streets of the city, in accordance with such terms and conditions as might be agreed upon. In January, 1889, the village council passed an ordinance which, as subsequently amended by the common council of the city, granted to certain persons, their successors or assigns, for 30 years, the privilege of laying water pipes and mains in the streets of the city on the following, among other, terms and conditions:

The grantees or their successors were within two years to have water-works of a specified extent, capacity, and power, constructed and ready for use, and to connect a specified number of fire hydrants with the water mains; the common council to have thereafter the right to order an extension of the mains along other streets which could be reached by a continuance of existing mains; the water company to put in fire hydrants at specified distances along such extensions, and to supply water at established rates to the inhabitants along the streets where the pipes were extended. The grantees were to maintain the mains and hydrants ready for use for fire protection and operate the water-works, after their completion, for the full term of 30 years. For the use of these hydrants (which proved to be 55 in number) the city was to pay \$80 each per year for the full term of 30 years. The city was to have the right to take from the mains water to supply all buildings occupied by it for public purposes. The water company was to furnish the city until March 1, 1914, with 12 other hydrants (in addition to the 55), and in consideration therefor the city was to pay all taxes assessed for city purposes on the water-works during the 30 years,

182 Power, & other water-works

183 The water-works

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and give to the company the use of certain water power owned by the city.

The ordinance provided for its acceptance by the grantees within 60 days, upon which it should constitute a contract between the parties, which should not be altered or amended except by mutual consent. The grantees assigned all their rights and privileges under the ordinance to the defendant, the Little Falls Electric & Water Company. The ordinance was accepted by the grantees, and the water works were constructed and put in operation, and, presumably, in the absence of any allegation to the contrary, the water company has complied with all the terms and conditions of the ordinance.

In addition to the foregoing facts, the complaint alleges that the needs of the city do not, never have, and will not for years, require a greater number of hydrants than 35; that \$80 per hydrant per year is an unreasonable and exorbitant price, and at least \$40 per hydrant per year higher than the reasonable value thereof; that the city and its officers, claiming and pretending that this ordinance is a valid and binding contract, are paying the water company \$80 per year for each of the 55 hydrants, and intend to continue to do so unless restrained by court.

The plaintiff's contention is that the ordinance, at least in so far as it assumes to obligate the city to pay this price for all these hydrants for 30 years, is void, because not within the scope of the power or authority of the village or city.

[The court held that if the contract was void, the plaintiff, as taxpayer, could maintain this action.]

This brings us to the merits of the case, viz.: whether it was within the scope of the authority of the village or city council to enter into a contract in behalf of the municipality obligating it to pay \$80 a year for 30 years for each of 55 fire hydrants.

The vice, if any, in this ordinance, viewed as a contract, consists mainly, if not entirely, in the length of time for which it bound the city to pay annually this sum of \$4,400 for fire hydrants. The number of hydrants, the price to be paid per hydrant, and the other provisions of the ordinance, are chiefly important in so far as they bear upon the question of the power of the village or city council to bind the city for so long a period of time. We have no doubt as to their power to contract with this or any other water company with reference to furnishing the city and its inhabitants with water. And, inasmuch as it might be impossible to induce any individual or corporation to expend the necessary capital to construct water-works in a small village or city without assurance of patronage by the municipality itself for some definite amount and time, we have no doubt of the power of the village or city council to make a time contract with the company for supplying the city with water for fire protection, provided the time is reasonable.¹ And as a

¹ In *Indianapolis v. Indianapolis Gas-Light Co.*, 66 Ind. 396, the court said: "Municipal corporations, besides the power to contract, which is generally granted to

somewhat liberal contract in this regard might be necessary to induce men to put in water-works at all, we would not be inclined to give any controlling weight to the mere fact that the number of hydrants contracted for was beyond the present needs of the city, or that the price agreed to be paid was somewhat greater than the value of the use of the hydrants, considered alone and by itself. But the power of municipal authorities to contract in relation to a given matter does not carry with it by implication power to make a contract, even with reference to such matter, which shall cede away, control, or embarrass their legislative or governmental powers, or render the municipality unable in the future to control any municipal matter over which it has legislative power.

Where municipal authorities are authorized to contract in relation to a particular matter, they have a discretion, as to methods and terms, with the honest and reasonable exercise of which a court cannot interfere, although they may not have chosen the best method, or made the most advantageous contract. But this is not an unlimited and arbitrary discretion to make any kind of contract that they see fit, as the court below, in its memorandum, seems to think. If so, the city council might have made a contract running 100, or even 500, years, as well as 30

them within certain limits, have legislative or governmental powers, by which they make by-laws to govern themselves, and pass ordinances to govern others, as the citizens of a town or city within their geographical limits. This power to legislate within the authority delegated to them by law is distinct from the power to contract, although exercised by the same corporation. . . . We think, therefore, that, when the City of Indianapolis made the contract in question with the Gas-Light Company, it made it in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make the contract was authorized by an ordinance; and, having the power to make a contract touching the subject-matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchises." See also *Quincy v. Bull*, *supra*, p. 173; *Boerth v. Detroit City Gas Co.*, *supra*, p. 179; especially the quotation from *Ill. Trust & Savings Bank v. Arkansas City*, on p. 144.

In *McBean v. Fresno*, 112 Cal. 159, the court sustained a five-year contract in which the city agreed to pay a certain price per year for the disposal of its garbage. HENSHAW, J., said:

"Upon the second proposition, namely, whether or not the contract operates as a surrender or suspension of the legislative powers of the trustees of the city, it is to be observed that there is in this State no inhibition against the making of a contract by a municipal board which shall extend for more than one year, or even beyond the term of office of the board which makes it. If the legislature desired to restrict municipalities in this particular, it could easily do so by the passage of a law such as exists in some other States declaring void any contract upon the part of a municipality which is to extend beyond the current fiscal year, or beyond the term of office of the authorities which enter into it. But, even in the absence of such provisions, courts look with disfavor upon contracts by municipalities involving the payment of moneys which extend over a long period of time; 1. Because such contracts in their nature tend to create a monopoly in favor of the other party thereto for supplying the city with the article contracted for. 2. Because they may involve an undue restraint upon the legislative powers of the successors of the board, and prevent those successors from availing themselves of a change in the times, of opposition, of reduced rates, or of other causes operating legitimately to decrease the price of the commodity, of which decrease in price the city by reason of its contract cannot avail itself.

"There is thus by law and reason a well-defined limit set to such contracts. In the absence of any other objection to them, they will not be upheld without a clear showing of a reasonable necessity for their execution. But if, on the other hand, it be made to appear, that at the time of its execution the contract was fair and just and reasonable, and prompted by the necessities of the situation, or was in its nature advantageous to the municipality at the time it was entered into, then such a contract will not be construed as an unreasonable restraint upon the powers of succeeding boards."

years. This would be a very dangerous doctrine, for by reason of the incompetency or dishonesty of these officials the powers of a municipality might be thus bartered away for so long a period of time as to practically disable it from performing its public duties.¹ While the ordinance, on its face, does not purport to grant any exclusive franchise, yet the practical effect is almost necessarily to give the grantees a monopoly for 30 years of the business of furnishing water to the city and its inhabitants. If the city is bound to pay \$4,400 a year for 30 years for water for fire protection alone, it probably could not afford to incur the extra expense of either building water-works itself, or making any contract with any other company that would induce it to do so. Hence, whatever improvement may be made in the future in the methods of supplying the public with water, in the quality of water supplied, or in the method of fire protection, the city and its inhabitants are tied down by this ordinance to the present system, and practically confined to the supply furnished by the company for 30 years.

Little Falls was, and is, a new and small city, whose future was uncertain. Thirty years is almost a generation, and, in this age, a long time in the history of any community. It has been attempted to bind it for that length of time to pay for between 35 and 40 per cent more hydrants than its present needs require, and to pay for them 100 per cent more than their present value. It may never need any such number of hydrants, and the value of their use may never increase so as to equal the price agreed to be paid. For these reasons we are of the opinion that the provisions of this ordinance, providing that the city should pay this price for this number of hydrants for 30 years, is, as to time, unreasonable and void, as being beyond the scope of the authority of the municipal authorities. What effect the invalidity of this provision will have on the balance of the ordinance we need not now consider. The fact that the plaintiff may have asked for more relief than he is entitled to under the facts pleaded does not affect the sufficiency of the complaint. It states facts entitling the plaintiff to an injunction restraining the city officers from continuing to pay the water company this money under this contract.

This will not in any way prevent the common council from providing the city with water, or in any way interfere with the exercise of their discretion as to the choice of ways and methods of doing so. They will remain at liberty to contract for such supply with the same company. They are not now paying this money in the exercise of any discretion, but on the ground that the city is legally bound by contract to pay it. The effect of the injunction will be merely to restrain their carrying out this invalid provision of the ordinance, and thus compel the municipal authorities to exercise in a legal way their power to contract for a supply

¹ In various cases, and under differing circumstances, 25 years, and sometimes 30 years, have been held to be reasonable periods for light and water contracts at fixed prices. See *Omaha Water Co. v. Omaha*, 147 Fed. 1, citing and reviewing decisions of the United States Supreme Court.

of water for fire protection, and properly to exercise their discretion as to ways and methods, precisely as if this invalid provision had never existed. If, in the honest exercise of their legislative discretion, the common council concludes that the city requires 55 hydrants for fire protection, and that \$80 per year per hydrant is a reasonable price, they would have the right to enter into a contract on those terms with the water company, to run a reasonable length of time.

There is no danger of such an injunction leaving the city without water for fire protection. The common council would have no right summarily to shut off the water, so as to leave the city without such protection, and certainly no court would compel them to do so. And, as the business of the water company is "affected with a public interest," it would have no right summarily and arbitrarily to shut off the supply of water because this "time provision" of the ordinance is declared invalid. Our conclusion is that the demurrer to the complaint should have been overruled.

*Order reversed.*¹

Key MC. 285.680-

WALLA WALLA CITY v. WALLA WALLA WATER COMPANY †

172 U. S. 1. 1898

By an act of November 28, 1883, the legislature of Washington Territory incorporated the city of Walla Walla, conferring upon it, among other powers, the power to provide a sufficient supply of water for the city, and the right to permit the use of the city streets for the purpose of laying pipes for furnishing such supply for a term not exceeding twenty-five years. The city, under this authority, by contract, granted to the Walla Walla Water Company the right to lay and maintain water mains, etc., for twenty-five years, reserving to itself the right to maintain fire hydrants and to flush sewers during this term, without charge. The contract further provided that it was voidable by the city, so far as it required the payment of money, upon the judgment of a court of competent jurisdiction, whenever there should be a substantial failure of such supply, or a like failure on the part of the company to perform its agreements, and that, until the contract should have been so avoided, the city should not erect, or maintain, or become interested in other water-works. These provisions were accepted by the Water Company, and were complied with by it, and the contract was in force when this bill was filed. In 1893 the city authorities passed an ordinance to provide for the construction of a system of water-works to

¹ The report of the case on re-argument has been omitted.

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supply the city with water, and to issue bonds for that purpose to the amount of one hundred and sixty thousand dollars, which ordinance was accepted by the necessary majority of legal voters. The Water Company then filed its bill to enjoin the city from creating the proposed water-works, or from expending city moneys for that purpose, or from issuing city securities therefor. To this bill the city demurred, resting its demurrer upon a want of jurisdiction. It also filed an answer insisting that the contract with the plaintiff was not a valid and binding contract, so far as concerned the stipulation binding the city not to erect or maintain or become interested in any system of water-works other than that of the plaintiff.

The demurrer to the bill having been overruled, and a preliminary injunction having been granted pursuant to the prayer of the bill, the case subsequently went to a hearing upon the pleadings and proofs, and resulted in a decree perpetuating the injunction. From this decree defendants appealed directly to this court, pursuant to section 5 of the Circuit Court of Appeals Act, allowing such appeal in any case that involves the construction or application of the Constitution of the United States.

Mr. A. H. Garland, for appellants. *Mr. J. Hamilton Lewis* and *Mr. R. Garland* were on his brief.

Mr. John H. Mitchell, for appellee.

MR. JUSTICE BROWN. . . . These allegations, upon their face, raise a question of the power of the city to impair the obligation of its contract with the plaintiff by the adoption of the ordinance of June 20, 1893. The argument of the defendant in this connection is that the action of the city in contracting with the water company, and in passing the ordinance of 1893 providing for the erection of water-works, was not in the exercise of its sovereignty, that in these particulars the city was not acting as the agent of the State, but was merely exercising a power as agent of its citizens, and representing solely their proprietary interests; that the council in such cases, as trustee for the citizens, stands in the relation to them as directors to stockholders in a private corporation, acting solely as the agent of the citizens and nowise as the agent of the State; and, therefore, that neither the State nor the city as its agent can be charged either with the making or the impairing of the original contract; that for these reasons the Constitution of the United States has no application to the case, the Federal Court has no jurisdiction, and the bill, upon its admitted facts, presents only a violation by a citizen of the State of its contract with another citizen, and the plaintiff is bound to resort to the State court for its remedy.

It may be conceded as a general proposition that there is a substantial distinction between the acts of a municipality as the agent of the State for the preservation of peace and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of

residence and business. Questions respecting this distinction have usually arisen in actions against the municipality for the negligence of its officers, in which its liability has been held to turn upon the question whether the duties of such officers were performed in the exercise of public functions or merely proprietary powers. It is now sought to carry this distinction a step farther, and to hold that, if a contract be made by a city in its proprietary capacity, the question whether such contract has been substantially affected by the subsequent action of the city does not present one of impairment by act of the State or its authorized agent, but one of an ordinary breach of contract by a private party, and hence the case does not arise under the Constitution and laws of the United States, and the court has no jurisdiction, unless there be the requisite diversity of citizenship. How far this distinction can be carried to defeat the jurisdiction of the court, or the application of the contract clause, may admit of considerable doubt, if the contract be authorized by the charter; but it is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64; *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. Ann. 138, 147. . . .

The case upon the merits depends largely upon the power of the city under its charter. The ordinance authorizing the contract which purports to have been passed in pursuance of this charter, declared that until such contract should be avoided by a court of competent jurisdiction, the city should not erect, maintain, or become interested in any water-works except the ones established by the company, while the ordinance of June 20, 1893, provided for the immediate construction of a system of water-works by the city for the purpose of supplying the city and its inhabitants with water. Upon the face of the two ordinances there was a plain conflict — the latter clearly impaired the obligation of the former.

The argument of the city is that the council exceeded its powers in authorizing the contract with the water company for a continuous supply of water and the payment of rentals for twenty-five years, and that such contract was specially obnoxious in its stipulation that the city should not construct water-works of its own during the life of the contract. The several objections to the contract are specifically stated by counsel for the city in their brief as follows:

a. The contract creates a monopoly which, in the absence of an express grant from the legislature of power so to do or such power necessarily implied, is void as in contravention of public policy;

b. The contract is void as an attempt to contract away a part of the governmental power of the city council;

c. The contract is void as creating an indebtedness in excess of the charter limits;

d. The contract is in violation of the express provision of a general statute of the Territory of Washington.

By section 10 of the city charter, the city is authorized "to grant the right to use the streets of said city for the purpose of laying gas and other pipes intended to furnish the inhabitants of said city with light or water, to any persons or association of persons for a term not exceeding twenty-five years . . . provided always, that none of the rights or privileges hereinafter granted shall be exclusive or prevent the council from granting the said rights to others;" and by section 11 "the city of Walla Walla shall have power to erect and maintain water-works within or without the city limits, or to authorize the erection of the same for the purpose of furnishing the city, or the inhabitants thereof, with a sufficient supply of water."

As the contract in question was expressly limited to twenty-five years, and as no attempt was made to grant an exclusive privilege to the Water Company, the city seems to have acted within the strictest limitation of the charter. *Atlantic City Water Works v. Atlantic City*, 48 N. J. Law, 378.

Had the privilege granted been an exclusive one, the contract might be considered objectionable upon the ground that it created a monopoly without an express sanction of the legislature to that effect. It is true that in *City of Brenham v. Brenham Water Works*, 67 Texas, 542, a city ordinance granting to the water company the right and privilege for the term of twenty-five years of supplying the city with water, for which the city agreed to pay an annual rental for each hydrant, the Supreme Court of Texas held to be the grant of an exclusive privilege to the water company for the period named. The decision seems to have been rested largely upon the use of the words "privilege" and "supplying" — words which are not found in the contract in this case. Without expressing an opinion upon the point involved in that case, we are content to say that an ordinance granting a right to a water company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of a city with water, does not, in our opinion, create a monopoly or prevent the granting of a similar franchise to another company. Particularly is this so when taken in connection with a further stipulation that the city shall not erect water-works of its own. This provision is not devoid of an implication that it was intended to exclude only competition from itself, and not from other parties whom it might choose to invest with a similar franchise.

The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed, or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself, nor its successors, to contracts prejudicial to the peace, good order, health, or morals of its inhabitants; but it is to cases of this class that these rulings have been confined.

If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the Constitution is ineffectual. Thus in *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, an act of the General Assembly of Illinois authorized the Fertilizing Company to establish and maintain for fifty years certain chemical works for the purpose of converting dead animals into agricultural fertilizers, and to maintain depots in Chicago for the purpose of receiving and carrying out of the city dead animals and other animal matter which it might buy or own. Subsequently, the charter of the village of Hyde Park was revised, and power given it to define or abate nuisances injurious to the public health. It was held that under this power the village had the right to prohibit the carrying of dead animals, or offensive matter, through the streets; that the charter of the company was a sufficient license until revoked, but was not a contract guaranteeing that the company might continue to carry on a business which had become a nuisance by the growth of population around its works, or that it should be exempt for fifty years from an exercise of the police power of the State, citing *Coates v. Mayor, etc., of New York*, 7 Cowen, 585.

Substantially the same ruling was made in *Butchers' Union Co. v. Crescent City, etc., Co.*, 111 U. S. 746, wherein an act of the legislature of Louisiana, granting exclusive privileges for maintaining slaughterhouses, was held to be subject to subsequent ordinances of the city of New Orleans, opening to general competition the right to build slaughterhouses.

The same principle has been applied to charters for the maintenance of lotteries which, upon grounds of public policy, have been held to be mere licenses and subject to abrogation in the exercise of the police power of the government; *Boyd v. Alabama*, 94 U. S. 645; *State v. Mississippi*, 101 U. S. 814; *Douglas v. Kentucky*, 168 U. S. 488; as well as to laws regulating the liquor traffic, *Beer Co. v. Massachusetts*, 97 U. S. 25; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; and even laws

regulating the inspection of coal oil; *United States v. DeWitt*, 9 Wall. 41; *Patterson v. Kentucky*, 97 U. S. 501. In the latter case it was held that a person holding a patent under the laws of the United States for an invention was not protected by such patent in selling oil condemned by a State inspector as unsafe for illuminating purposes.

Under this power and the analogous power of taxation we should have no doubt that the city council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. *New York v. Squire*, 145 U. S. 175; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78. But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it.

Nor do we think the contract objectionable in its stipulation that the city would not erect water-works of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect water-works of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn and pay for the water-works of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That if the city should desire to establish water-works of its own it would do so by condemning the property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.

An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of water-works the company would necessarily incur a large expense in the construction of the power house and the laying of its pipes through the streets, and, as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes

of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself — a field in which it undoubtedly would have become the master — and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking.

Cases are not infrequent where under a general power to cause the streets of a city to be lighted, or to furnish its inhabitants with a supply of water, without limitation as to time, it has been held that the city has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party. The more prominent of these cases are *Minturn v. Larue*, 23 How. 435; *Wright v. Nagle*, 101 U. S. 791; *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 262; *Logan v. Pyne*, 43 Ia. 524; *Jackson Co. Horse Railroad v. Rapid Transit Railway Co.*, 24 Fed. Rep. 306; *Norwich Gas Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Saginaw Gas Light Co. v. Saginaw*, 28 Fed. Rep. 529; *Grand Rapids Electric Light and Power Co. v. Grand Rapids Edison etc., Gas Co.*, 33 Fed. Rep. 659; *Gale v. Kalamazoo*, 23 Mich. 344. These cases furnish little or no support to the proposition for which they are cited.

If, as alleged in the answer, the water company failed to carry out its contract, and the supply furnished was inadequate for domestic, sanitary, or fire purposes, and the pressure so far insufficient that in many parts of the city water could not be carried above the first story of the buildings, the seventh section of the contract furnished an adequate and complete remedy by an application to the courts to declare the contract void. . . .

Upon the whole case, we are of opinion that the decree of the Circuit Court must be

Affirmed.

CHAPTER VII

MUNICIPAL BODIES

1. *Notice and Quorum*

KAVANAUGH v. CITY OF WAUSAU *

120 Wis. 611. 1904

APPEAL from a judgment of the Circuit Court for Marathon County. Action to recover the purchase price of a horse alleged to have been sold and delivered to defendant by plaintiff, for \$100. Defendant answered by general denial; and further that a committee of the council consisting of three members thereof was authorized to purchase a horse for the city, that two of them without any notification to the other of a meeting to consider the matter, negotiated with the plaintiff for the purchase of the horse in question, and made such purchase so far as they had authority to do so, the other member of the committee not being consulted in the matter or having any notice of the proceeding.

Upon the trial the evidence was undisputed that a committee was empowered to buy a horse as alleged in the answer, and that two of such committee acted in the matter without any notification to the other of any meeting for that purpose, and without any participation by such other in the matter, as alleged. At the close of the evidence defendant's counsel made a motion that a verdict be directed for the defendant which was overruled. The verdict was for the plaintiff. Exceptions were duly taken by the defendant to the rulings discussed in the opinion.

M. B. Rosenberry, for appellant.

Neal Brown, for respondent.

MARSHALL, J. The motion of appellant's counsel for a verdict was based on the theory that the action of two members of the committee, in contracting for the horse without notice to their associate or opportunity for him to participate in the matter, was not valid. The motion was overruled on the theory that a committee of a governing body intrusted to do a particular thing of a public nature, though requiring the exercise of judgment, may act when a majority of its members are present and concur; and that when action is thus taken there is a conclusive presumption that all essentials to the validity thereof have been duly complied with. We confess unfamiliarity with such a rule. True, a committee may act by a majority of its members in such a case as the one in question, but only when all members have due opportunity to be

present, and in the absence of evidence to the contrary, the presumption is that there was such opportunity; but the mere circumstance of such a majority action in the absence of the minority raises no conclusive presumption that such minority was duly notified and could have been present by making a reasonable effort to do so, or that such minority consented. There are authorities to the effect that such a committee, empowered to perform some mere ministerial duty, may act validly by concert of a majority regardless of notice to the minority; and some cases may be found — counsel for respondent discovered one of them — supporting the validity of the act of the majority of a committee in a matter requiring the exercise of judgment without opportunity for the minority to participate in the proceedings. But such authorities are rare. They are based on exceptional circumstances and probably in the main, if not universally, recognize the general rule to be that such a committee can act validly only by a majority vote when all the members are either present or have been notified and given opportunity to be present. In the case cited by counsel, *Gallup v. Tracy*, 25 Conn. 10, the court said:

"We make no question that the general principle of law is that public agents may act by majorities where all are present or when all have notice to be present, and generally not otherwise."

Many cases might be cited to the same effect, mostly quite ancient, since the rule is so elementary that it is rarely called in question with a sufficient degree of success to require a restatement of it in published decisions. We will refer to the following: *Downing v. Rugar*, 21 Wend. 178; *Grindley v. Barker*, 1 Bos. & Pull. 229; *Dobson v. Fussy*, 7 Bing. 305; *Green v. Miller*, 6 Johns. 39; *Groton v. Hurlburt*, 22 Conn. 178; *Martin v. Lemon*, 26 Conn. 192; *Wilson v. Waltersville School Dist.*, 46 Conn. 400; *Keeler v. Frost*, 22 Barb. 400; *Perry v. Tynen*, 22 Barb. 137; 1 *Dill., Mun. Corp.*, § 283 and note.

The gist of what the court said in *Perry v. Tynen*, as embodied in the syllabus, is in harmony with the language of all courts in speaking on the subject above discussed:

"In cases of the delegation of a public authority to three or more persons, the authority conferred may be exercised and performed by a majority of the whole number. If the act to be done by virtue of such public authority requires the exercise of discretion and judgment — i. e., if it is a judicial act — the persons to whom the authority is delegated must meet and confer together, and be present when the act is performed; or at least a majority must meet, confer, and be present, after all have been notified to attend."¹

¹ In the opinion from which this quotation is taken, the words are preceded by the following: "There is a distinction between a delegation of power for public, and for private purposes. Where the power is delegated for a mere private purpose, all the persons (if more than one) upon whom the authority is conferred must unite and concur in the exercise." The court farther on remarks: "If there are only two to whom a public authority is delegated, it necessarily follows that nothing can be done without the consent of both."

That the duty which devolved upon the committee in question was other than merely ministerial in character, seems evident. They were required, not only to buy a horse, but to select a horse to be bought, passing upon the suitability of the animal for the purposes for which it was intended.

The learned counsel for respondent seem to have labored industriously to discover support for the view entertained by the learned circuit judge, without success. The only authority cited to our attention applying any such view is *Gallup v. Tracy*, 25 Conn. 10, and that, as we have seen, does not support it. In *Wilson v. Wallersville School Dist.*, *supra*, it is said that of the numerous decisions of the Supreme Court of Connecticut on the subject, *Gallup v. Tracy* stands alone in violating the common-law doctrine declared in *Martin v. Lemon*. Counsel lay great stress on *Downing v. Rugar*, 21 Wend. 178, but that, though an extreme case, goes no further than to hold that in circumstances like those before us, the presumption that the absent member consented to the act of his associates should prevail in the absence of testimony to the contrary. The testimony here is all one way that two members of the committee met without previous notice or concurrence in the matter, and made the trade without the other member of the committee knowing that any such transaction was in contemplation. In the face of that, the presumption of notice to the non-participating member of the committee, or consent by him to the act of his associates, is obviously most completely rebutted. The absent one could not have been notified of a meeting that was never called. He could not have consented to an action which was not official and of which he had no knowledge whatever. To hold in such circumstances that there is a conclusive presumption of concurrence by the absent member of the committee, as did the trial court, would open the door wide for the perpetration of frauds upon municipalities by committees of their governing bodies, which, in the very nature of things, must be entrusted with the performance of many duties of a discretionary character in business transactions. The ruling of the trial court was clearly wrong. The motion for a directed verdict should have been granted, at least unless there was some warrant for holding that the unauthorized act of the two members of the committee was subsequently ratified.

It does not appear from the judge's charge to the jury that the idea of ratification was indulged in upon the trial. The cause was rested solely upon the theory that if a majority of the committee agreed with respondent as to the purchase of the horse, that was sufficient on the question of whether a valid contract in that regard was made or not, irrespective of whether the third member of the committee had any opportunity to consider the matter. The learned judge, consistent with his decision on the motion to direct a verdict, so erroneously instructed the jury. No claim is now made of any ratification by the committee of the unauthorized transaction by the two members, but it is suggested

that the disallowance of the claim by the common council upon the report of the comptroller that the horse was not as represented, was in effect a ratification of the contract and rescission thereof. There would be much force in that if there was evidence showing that the common council, when such action was taken knew the facts rendering the transaction with respondent invalid. It is elementary that the infirmities as to the validity of a contract made by one ostensibly for and upon the authority of another must be known, actually or constructively, to such other, else his conduct in respect thereto cannot be construed as a ratification thereof. That rules this case on the subject in favor of appellant. . . .

BY THE COURT. The judgment is reversed, and the cause remanded for a new trial.

CORNELL, J., IN STATE v. SMITH

22 Minn. 218. 1875

INASMUCH as it is not only the duty, but the right, of each member to be present and participate in the deliberations and proceedings of the council, a legal notice to all of every meeting, whether regular or special, is requisite, in order to enable a quorum of the council to act, and to give validity to its transactions. This object is accomplished, in the case of its regular meetings, by a resolution fixing the time and place thereof, of which all must take notice; whereas, as to special meetings, called by the mayor, personal notice must be served in the manner provided by the charter; and, as these two are the only modes provided by the charter for convening the council, a meeting assembled under any other authority, or in any other manner, would be so far unauthorized and illegal that no valid action could be taken by a mere quorum, neither would any alderman be under any obligation to take any notice of it, nor could his attendance be enforced.

In case, however, all the members concur in meeting, organizing and acting as a body in reference to matters clearly within the scope of their corporate powers, there is nothing in the charter expressly or impliedly prohibiting them from so doing, or invalidating their action. The powers conferred, and the duties imposed upon the common council were obviously with the view of their being exercised whenever occasion required, and no limitation or restriction upon its right voluntarily to meet at any time for such purpose can be inferred from the fact that it is made obligatory upon it to provide by resolution for a regular time and place of meeting, or the fact that it may be convened at any time upon call of the mayor. . . .

Assuming, as is claimed by appellants, that the adjournment from the 25th to the 29th of April was irregular because of the want of a quorum,¹ it does not appear, either from the findings of the court below or otherwise, but that the adjourned meeting was fully attended by all the members of the council, and that they all participated in its proceedings and in the election which was then had. In the absence of such finding the presumption is that they all did so attend, and acquiesced in the irregular adjournment. "Illegality will not be presumed, but the contrary. The maxim of law in such cases is, *omnia rite acta presumuntur*." *Citizens' M. F. Ins. Co. v. Sortwell*, 8 Allen, 219, 223; *Sargent v. Webster*, 13 Met. 497, 504. . . .

STONE, J., IN *HEISKELL v. MAYOR, ETC. OF*
BALTIMORE

65 Md. 125. 1885

THE question then is squarely presented, "Had the First Branch the legal right to determine what should constitute a quorum?"

The appellee, a municipal corporation, was created by Act of the General Assembly. Of the power of the General Assembly to fix and determine what should be a quorum, there can be no possible doubt. This power the General Assembly has several times exercised. Thus in 1796 it provided that a quorum of the city council should consist of three-fourths of the members; subsequently the legislature fixed the quorum at two-thirds; but, finally, in 1868, in amending the law relating to the city council, nothing was said as to what should be a quorum, and so the law stood, at the time the repealing ordinance was passed. . . .

Now it has been urged, in behalf of the appellant, that the legislature having granted to this municipal corporation the right, "to settle their rules of procedure," this power includes the right to fix the quorum.

"Rules of procedure" are rules made by any legislative body, as to the mode and manner of conducting the business of the body. They are intended for the orderly and proper disposition of the matters before it. Thus, what committees, and upon what subjects they shall be appointed; what shall be the daily order in which the business shall be taken up; in what order certain motions shall be received, and acted upon, and many other kindred matters, are proper subjects of the rules of procedure. These rules operate nowhere except in the

¹ The weight of authority is to the effect that less than a quorum, if met at the time and place set for a duly called meeting may keep the meeting alive by adjournment. *R. v. Col. Sec. by Const. T. &*

The chairman did not take the chair till a quorum was present, except on the hope of being a quorum then no bus can be transacted except simply to adjourn.

legislative hall of the body that adopts them, and in this country, where what are called in England standing orders are almost unknown, expire at the end of the session.

But these rules of procedure never contravene the statute or common law of the land. When the Constitution of the United States gave to each house of Congress, and the constitution of the State of Maryland to each house of the General Assembly, the right to determine its rules of proceeding, it was never held for a moment that such a right included the power to change any existing statute or common law; much less can a municipal corporation claim the right under the guise of permission to frame their rules of procedure, such unlimited power. This surely must be conceded by every one; and being so conceded, the next question for us to consider is whether the right to fix a quorum, does contravene any existing law of the land.

As a general rule in this country the constitutions of the several States fix upon what shall be a quorum in the legislative assemblies. So as a general rule, perhaps, the power that creates a municipal corporation fixes the number of the members that shall constitute the quorum. The quorum of a body may be defined to be that number of the body, which, when assembled in their proper place, will enable them to transact their proper business, or in other words that number that makes the lawful body, and gives them the power to pass a law or ordinance.

But when in the case, like the present, of a municipal corporation, the statute law creating it is silent, as to what shall constitute a legal assembly, the common law, both in England and in this country is well settled, that the majority of the members elect shall constitute the legal body. In *Blacket v. Blacket*, 9 B. & C., 851, the court recognize the general rule of law prevailing in England, "that a public trust committed to a definite number of persons should be executed at a meeting where a majority of that number is present." So in this country Mr. Dillon states that, "The common-law rules as to quorums and majorities established with reference to corporate bodies, consisting of a definite number of corporators, have in general been applied to the common council, or select governing bodies, of our municipal corporations where the matter is not regulated by charter or statute." 1 *Dill., Mun. Corp.* 278.

Indeed the appellant concedes that in the absence of a statute fixing a quorum, a majority of any body consisting of a definite number, is necessary to constitute a quorum; but he insists that the majority, when so organized, may make *more* than a majority necessary to constitute a legal body.

But if we concede, as we must do, that where the charter is silent the *common law* fixes the *majority* as the *legal body*, the case of the appellant is at an end. For the body itself to attempt to fix a greater number, is for the body to attempt to change a rule of the common law.

2. *Prevailing Number* -STATE *v.* MAYOR OF ST. JOSEPH

37 Mo. 270. 1866

HOLMES, J. This is a petition for a *mandamus* on the mayor of the city of St. Joseph, requiring him to sign and issue certain bonds of the city. The return admits the facts stated in the petition. By the Act of the General Assembly of Missouri of the 19th of December, 1865, it was provided that the mayor and council of the city of St. Joseph should cause all propositions "to create a debt by borrowing money for any purpose whatsoever," to be submitted "to a vote of the qualified voters of said city," and that in all such cases it should require "two-thirds of such qualified voters to sanction the same." . . .

The only reason given by the mayor for declining to sign the bond in question was, that he was in doubt whether the matter was to be determined by two-thirds of all the votes polled at that special election, or by two-thirds of all the voters resident in the city, absolutely, whether voting or not. We think it was sufficient that two-thirds of all the qualified voters who voted at the special election, authorized for the express purpose of determining that question, on public notice duly given, voted in favor of the proposition. This was the mode provided by law for ascertaining the sense of the qualified voters of the city upon that question. There would appear to be no other practicable way in which the matter could be determined.

A peremptory *mandamus* will be ordered.

LAWRENCE *v.* INGERSOLL *et als.**

88 Tenn. 52. 1889

APPEAL from Chancery Court of Knox County.

Bill by Lawrence, claiming to be a duly elected and qualified member of the board of education of Knoxville, for an injunction against the four other members of the board to prohibit them from meeting and acting without him, and to compel them by *mandamus* to recognize him as a member.

By the city charter, the board of mayor and aldermen were made to consist of nine aldermen, beside the mayor, who should not vote except in case of a tie when he should have the deciding vote. A majority

of the members of the board of mayor and aldermen were made a quorum for the transaction of business.

The plaintiff introduced the records of the mayor and aldermen, which showed that at a meeting on January 27, 1888, eight aldermen and the mayor were present. Upon balloting to elect a member of the board of education, to fill a vacancy caused by resignation, the plaintiff had four votes and one Fisher three votes, and a blank ballot was cast which was thrown out. The mayor declared the plaintiff duly elected. A motion to reconsider was made and seconded, the ayes and noes were taken on roll call, and it appeared that four aldermen voted aye and four no; and the mayor decided the motion lost.

An injunction was issued and a *mandamus* awarded as prayed for. Respondents appealed and assigned errors.

Taylor & Hood and Wat. M. Cocke, for Lawrence.

J. W. Caldwell and Ingersoll & Peyton, for Ingersoll.

SNODGRASS, J. . . . It is observed that there are nine aldermen, who, with the mayor, are to make the election, if all are present, the mayor having no vote, as no tie could result; that if less than nine are present, but a majority of that number, then those present may elect; but, if equally divided in an election, the mayor may cast the deciding vote, the only contingency in which his act can affect the question. In the election now being considered a majority (eight) were present and participating in the election. This appears both in the recitals of the record hereinbefore shown and in the fact that seven ballots were cast for the candidates and one blank ballot.

It remains now to inquire what is the effect of this action on the part of this board acting through its eight members, an authorized quorum. In determining this question it must be borne in mind that we are not examining the effect of an election by an indefinite number of electors — as, the vote of the body of the people of the city, or the vote of any indefinite number of people in a popular election — for the rule governing the one is entirely different from that governing the other. In the case of a general or special election by the vote of the people, by the vote of an indefinite number, the common-law rule is that a plurality of votes elects, — that is, the candidate getting more votes than any other is elected, although he does not get a majority of the votes cast, and hence it makes no difference that there are absent voters or blank votes cast. They do not change the fact that one candidate receives a plurality, and cannot do so in the very nature of things. *Cooley, Const. Lim.*, § 779, 5th ed. See also §§ 770, 771. Mr. Cooley treats alone the subject of popular elections, the scope of his work not including elections by governing bodies of corporations.

This is not only the rule at common law, but it is so by statute in this State; and hence in our elections by the people the candidate who gets the highest number of votes is elected. And this rule is applied to corporate action where the corporate power resides in the inhabitants or

citizens at large, and where they meet and act in their primary capacity, — and hence in indefinite numbers. *Dill., Mun. Corp.*, §§ 208-215. But the rule is equally well settled, and indeed is not open to controversy, that where an election is to be made by a definite body of electors, as a number of aldermen, that, "in the absence of special provision, the major part of those present at a meeting of this select body must concur in order to do any valid act." *Dill., Mun. Corp.*, vol. 1., §§ 216, 220. "Where, therefore," adds the author, "it appeared that thirteen ballots were cast when the members present were only entitled to give twelve votes, of which seven were for one person and six for another, there is no election and the council, though it has declared that the person receiving seven votes was duly elected, may rescind its action and proceed to a new election." *Ibid.* And this common law rule as to majorities, he declares is applied to governing bodies of municipal corporations where not specially regulated by charter or statutes. §§ 216, 217. We have seen that it is not only differently regulated by the charter of Knoxville or other statute of Tennessee, but that the charter provides for the transaction of business only by a majority of a quorum, and gives the mayor a right to vote when the majority thereof cannot decide, thereby conclusively showing that a majority must *concur*, or there is no result. A different rule, as we have seen, and we repeat, prevails at common law where the election is by an indefinite number of electors, in which a plurality of votes is sufficient for an election.

These rules and their distinctions are very forcibly and clearly stated in the able treatise on elections in the sixth volume of American and English Encyclopedia of Law, as follows: "The only way to defeat the election of a candidate at an election where the number of the electors is indefinite, or where the law does not require a majority of all the members of a body, having a definite number (as opposed to a majority of those voting), is by voting for another candidate; and the fact that a majority enters a protest against the minority candidate voted for at a regularly called election will not defeat the election if no other candidate is voted for. This rule does not apply to cases where the elective body consists of a definite number and a majority of the members is required for an election. In such case a refusal to vote, or a blank vote by a majority, will defeat an election." Pages 331, 332.

We have heretofore seen that under this charter a majority of the quorum is required. This author shows, further, that the rule respecting the election by a definite number in a municipal body extends also to other bodies of definite numbers, as legislatures, etc., and shows that in such case a majority must concur and vote *for* the candidate in order to elect him, quoting several cases and instances of high authority. . . .

Thus it appears, by concurrence of text-book, judicial, senatorial, congressional, and legislative authority, that the rule is settled that a majority of a definite body present and acting must vote for a candidate in

order to elect him, and that it is not sufficient that he receive a plurality of votes cast, or a majority of blank ballots are excluded. His claim must not depend upon the negative character of the opposition, but upon the affirmative strength of his own vote. It is not sufficient that a majority were not cast against him; to be elected, the majority must be cast for him.

"So if a board of village trustees consists of *five members and all or four are present*, two can do no valid act, even though the others are disqualified by interest from voting, and therefore omit or decline to vote. Their assenting to the measure voted for by the two will not make it valid. If three only were present, they would constitute a quorum. Then the votes of two, being a majority of the quorum, would be valid; certainly so where the three are all competent to act." *Dill., Mun. Corp.*, vol. 1, § 217.

These authorities answer the proposition urged by complainant that the blank vote must not be considered, and it must be treated as though only seven votes were cast and he got four. It is true that the blank vote cannot be, in the technical sense, a ballot; but it is nevertheless an act of negation — affirmative in showing that another voter acted, and negative in determining the majority. It was one of eight, attempted to be cast with a purpose of not supporting complainant, and is only to be counted as showing that he did not get a majority; just as would have resulted had it been an illegal vote, as, being for two candidates or otherwise.

But complainant's case would be no better if that vote was entirely disregarded, because the record otherwise shows that eight aldermen were present, and, without reference to their vote, he must have received five votes in order to be elected. . . .

But it is said that the mayor declared the election carried, and that this is equivalent to a vote for him, and, with four votes for him and four not for him, the mayor's vote or action makes the election.

There are several answers to this — all conclusive.

First, the mayor had no right to vote, as there was no tie; and second, he did not vote. Third, his action declaring the result without voting could not make an election, because the law does not allow him to declare a candidate elected, even on a tie, without voting, or at all. He can only, in such case, vote and make an election; and when he does this, it makes it, even though he should then declare the candidate not elected.

A still further argument is made, however, that the board appears to have ratified it, and this should be treated as giving it validity. The answers to this are, if possible, even more conclusive. They are: First, that the board has no power to elect except by ballot. There was never but one ballot cast, and if that did not make it, no election *could otherwise be made*. Second, the board did not ratify it. On the contrary, four members voted to reconsider, and, therefore, against ratification, and four for it. This, at best, while unimportant, was not an affirmative;

it was, at most, but a tie, which the mayor might, by his vote, have decided. He did not choose to vote, but instead, declared the matter lost. In both instances the mayor refused or failed to vote, and contented himself with declaring that the results stood accomplished without his vote.

(We are not presenting the parliamentary question, or attempting to show that four against four would rescind any legal action. We are only showing that no majority ever in any way voted to ratify the election.) The argument need not be repeated here that this meant nothing and accomplished nothing. The law is that they could not make an election by ratification, and the fact is, they did not.

The construction herein given to the charter regulating municipal elections and the action of municipal boards is not only sound in law but in policy. It would be of the most injurious consequence to hold that municipal bodies could make elections, or appropriate money, legislate rights away, or pass measures affecting vast property interests by less than an affirmative vote of an acting majority. . . .

Reverse the decree and dismiss the bill with cost.

TURNER, C. J., dissenting. . . .

Under the facts stated, a majority is of opinion there was no such election as the charter contemplates, and in support, rely, in part, on section 220, second volume of Dillon on *Municipal Corporations*, which is: "In the absence of special provision, the *major part of those present* at a meeting of a select body *must concur* in order to do any valid act." This is construed to mean that the candidate must have a majority of the votes of all present entitled to a vote, and that, while the seven voting constituted a quorum for the transaction of any business of the board, there was not the majority of all present, and, therefore, no election, and complainant entitled to no relief under his bill.

I do not assent to this conclusion, and am of opinion that, even under the rule laid down by Mr. Dillon, there was an election. There was no dissent to the motion for an election; therefore, to hold it, as was done, was a "valid act," to which there was a concurrence, not only of the "major part," but of all present. If it was necessary that all the aldermen present should vote, then I am of opinion such necessity was conformed to, and that eight votes were cast, although one of the ballots was a blank. If the blank can be regarded at all, it must be as an expression of indifference by the alderman who cast it as between the two nominated candidates, and, therefore, as an expression of consent that he who should receive a majority of those actually voting should be the elected member of the board of education, and (if the blank was considered at all) such was the interpretation of the mayor when he declared Lawrence elected. Such was the interpretation of the board in refusing to reconsider; and also in the unchallenged certificate of election, furnished by the recorder, "by order of the Board," with objection from no one.

To my mind it is clear that no account should be taken of the blank ballot, nor of the nominal presence of the alderman who cast it. He might have retired from the room, in which event I understand it to be agreed that a majority of the seven voting would have made an election; his absence would, of itself, make the "action" of the "major part present" "valid." The question then is, Was it necessary that his absence should have carried him out of sight or hearing? I think not. When he determined (after voting that an election be held), that he would take no part in the election, he in legal contemplation absented himself from the board, and did not change that contemplation by dropping a blank in the ballot-box, any more than would the failure of a qualified voter present at the poles of a town or city election, to cast a vote; nor any more than the casting a blank by such voter would change the result. Both would be failures to vote; both would be absences from the election as a voter.

No weight should be attached to the fact that he voted for an election to be held at that meeting. That would not make him present for the election any more strongly than it would make him present for an election on the next or any subsequent day. Nothing can constitute a presence but participation. If there was participation, it was by acts signifying a full acquiescence in the action of the majority voting.

Judge Cooley, in his work on *Constitutional Limitations*, 3d ed., Section 14, states the rule more strongly against the defendants than I have done. He says: "In most of the States a plurality of the votes cast determines the election; in others, *as to some elections*, a majority. But in determining upon a majority or plurality, the blank votes, if any, are not to be counted, and a candidate may therefore be chosen without receiving a plurality or majority of voices of those *who actually participated in the election.*" (Italics mine.)

Under this rule the blank is not to be counted. The presence of him who cast it was not necessary to a quorum to make an election. If he had been in fact absent, it is admitted the election would have been lawful, and free from objection. If Judge Cooley is right, it follows that, although we may hold that the casting a blank ballot was a participation in the election, still complainant, having a majority of such number as was authorized to elect, was elected, notwithstanding the presence and participation of him who cast the blank, which is not to be counted. If there had been five present at the election, with three voting for one man and two for another, or two voting blanks or not voting at all, the election would have been complete. Here were seven actually voting, and one not, and we are asked to count the blank against the complainant. We may as well, by the same process of reasoning, count it for him. The juster rule is not to count it at all. It seems to me the rule cited from Judge Cooley is the one this State should adopt in the first case of the kind arising in our courts. The blank was nothing, should be counted for nothing; without it or its author there was a complete

quorum, and their action should be affirmed. If a quorum may hold an election, a majority of that quorum may make an election.

Under the rule laid down by the majority, it is put in the power of one man to defeat an election when he sees that his vote for his favorite will make a tie, as then the mayor cannot cast his vote. So if he, the voter, desires a defeat, he can accomplish it by a blank.¹

3. Elections

PEOPLE *ex rel.* FURMAN *et al.* v. CLUTE †

50 N. Y. 451. 1872

ACTION to oust the defendant from the office of superintendent of the poor of the county of Schenectady and to put the relator in possession.

At the general election in 1871, the relator, Furman, and the defendant, Clute, were candidates for that office. The whole number of votes cast was 4,676, of which Clute received 2,448 and Furman 2,228. Of the votes given for Clute 295 were given in the fifth ward. Clute was declared elected, was duly qualified, entered into office, and continues therein. At the time of the election Clute was supervisor of the fifth ward of the city of Schenectady, and he continued to fill that office until December 12, 1871, when he resigned.

By R. S., 4th ed., part 1, title 1, ch. 20, § 22, as amended by Laws of 1853, ch. 80, § 22, it is provided that: "No supervisor of any town . . . shall be elected or appointed to hold the office of superintendent of the poor . . . in any county . . ." The charter of the city of

¹ *Rushville Gas Co. v. Rushville* is in accord with the minority opinion. In that case ELLIOTT, J., said:

"The rule is that if there is a quorum present and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of members present that is required; all that is requisite is a majority of the number of members required to constitute a quorum. If there had been four members of the common council present, and three had voted for the resolution and one had voted against it, or had not voted at all, no one would hesitate to affirm that the resolution was duly passed, and it can make no difference whether four or six members are present, since it is always the vote of the majority of the quorum that is effective. The mere presence of inactive members does not impair the right of the majority of the quorum to proceed with the business of the body. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence, rather than opposition. Their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members."

In *Dillon, Municipal Corporations* (4th ed.), p. 369, in noting the decision in this (the *Rushville*) case, Judge Dillon says: "It deserves further consideration whether this result is consistent with the majority rule applicable to definite bodies."

Says us & next motion: actual reason

... mesa

Schenectady provided that the supervisors of wards in the city should be subject to the provisions of law applicable to the supervisors of towns.

There was no proof of actual notice to any of the electors of the county of Clute's ineligibility, nor proof of any facts from which notice could be inferred other than that he held the office of supervisor of the fifth ward. The Special Term adjudged that neither candidate was entitled to the office. The General Term affirmed the judgment so far as that the defendant be ousted from the office, but adjudged that the relator was entitled thereto, and gave judgment accordingly. The defendant appealed.

J. S. Landon, for the appellant.

E. W. Paige, for the respondents.

FOLGER, J. . . . We are, therefore, of the opinion that the defendant Clute was not, at the general election in 1871, eligible to the office of superintendent of the poor of the county of Schenectady.

The second question to be considered is whether Furman, the relator, was, at the general election of 1871, duly elected to the office. Neither a majority nor a plurality of all the ballots found in the boxes were for him. He had but a minority of them.

It is the theory and the general practice of our government that the candidate who has but a minority of the legal votes cast does not become a duly elected officer. But it is also the theory and practice of our government, that a minority of the whole body of qualified electors may elect to an office, when a majority of that body refuse or decline to vote for anyone for that office. Those of them who are absent from the polls, in theory and practical result are assumed to assent to the action of those who go to the polls; and those who go to the polls, and who do not vote for any candidate for an office, are bound by the result of the action of those who do; and those who go to the polls and who vote for a person for an office, if for any valid reason their votes are as if no votes, they also are bound by the result of the action of those whose votes are valid and of effect. As if, in voting for an office to which one only can be elected, two are voted for, and their names appear together on the ballot, the ballot so far is lost. The votes are as if for a dead man or for no man. They are thrown away; and those who cast them are to be held as intending to throw them away, and not to vote for any person capable of the office. And then he who receives the highest number of earnest valid ballots, is the one chosen to the office.

We may go a step further. They, who, knowing that a person is ineligible to office by reason of any disqualification, persistently give their ballots for him, do throw away their votes, and are to be held as meaning not to vote for anyone for that office. But when shall it be said that an elector so knows of a disqualification rendering ineligible the person, and knowing, persistently casts for him his ballot? There

may be notice of the disqualifying fact, and of the legal effect of it, given so directly to the voter, as that he shall be charged with actual knowledge of the disqualification.

There may be a disqualifying fact so patent or notorious, as that knowledge in the elector of the ineligibility may be presumed as matter of law. In modern times Lord Denman, C. J., thus puts a case: "No one can doubt that if an elector would nominate and vote only for a woman to fill the office of mayor, or burgess in parliament, his vote would be thrown away; there the fact would be notorious, and every man would be presumed to know the law upon that fact." *Gosling v. Veley*, 7 Ad. & Ell. N. R. 406-439; 53 Eng. Com. Law, 406.

In the multitude of cases in which the question has arisen, we think that up to this point, there is no essential difference of result. All agree that there must be prior notice to, or knowledge in the elector of fact and law, to make his vote so ineffectual as that it is thrown away. But some say that if there be a public law, declaratory that the existence of a certain fact creates ineligibility in the candidate, the elector having notice of the fact, is conclusively presumed in law to have knowledge of the legal rule, and to be deemed to have voted in persistent disregard of it. Others deny that the maxim, "*Ignorantia juris excuset neminem*" (even with the clause of it, "*quod quisque scire tenetur*," not often quoted, and of which we are reminded by the very thorough brief of the learned counsel for the relator), can be carried to that length, and insist that there does not apply to this question the rule that all citizens must be held to know the general laws of the land, and the special law affecting their own locality.

That maxim, in its proper application, goes to the length of denying to the offender against the criminal law a justification in his ignorance thereof; or to one liable for a breach of contract, or for civil tort, the excuse that he did not know of the rule which fixes his liability. It finds its proper application when it says to the elector, who, ignorant of the law which disqualifies, has voted for a candidate ineligible, Your ignorance will not excuse you and save your vote; the law must stand, and your vote in conflict with it must be lost to you. But it does not have a proper application when it is carried further, and charges upon the elector such a presumption of knowledge of fact and of law as finds him full of the intent to vote in the face of knowledge, and to so persist, in casting his vote for one for whom he knows that it cannot be counted, as to manifest a purpose to waste it. The maxim itself concedes that there may be a lack of actual knowledge of the law. For it is *ignorance* of it which shall not excuse. Then the knowledge of the law, to which each one is held, is a theoretical knowledge; and the doctrine urged upon us would carry a theoretical knowledge of the statute further than goes the statute itself. The statute but makes ineffectual to elect the votes given for one disqualified. The doctrine would make knowledge not actual, of that statute thus limited, waste the

votes of the majority, and bring about the choice to office by the votes of a minority. We are not cited to nor do we find any decision to that extent of any court in this State. The industrious research of the learned counsel for the relator has found some from courts in sister states. *Gulick v. New* (14 Ind. 97), is to that effect. *Carson v. McPhe-tridge* (15 *id.* 331), follows the last cited case. [The court here refers to various authorities.]

We have consulted many of the authorities cited to us from the English books; and in them it will be found, we think, that where it was held that votes for an ineligible person would be treated as thrown away, it was not extended beyond cases in which there was actual notice of fact and of law to the voters before their votes were cast. *Gosling v. Veley*, *supra*; *Rex v. Hawkins*, 10 East. 211; *Claridge v. Evelyn*, 5 Barn. & Ald. 81; Douglass 398 n. (22); *Rex v. Parry*, 14 East. 549; *Rex v. Bridge*, 1 Maule & Selw. 76.

And there are American authorities which hold that if a majority of those voting by mistake of law or fact happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him in poll shall receive the office. *Saunders v. Haynes*, 13 Cal. 145; *State v. Giles*, 1 Chand. (Wis.) 112; *State v. Smith*, 14 Wis. 497. And in *Dill. Mun. Corp.* (p. 176, § 135) it is stated that unless the votes for an ineligible person are expressly declared to be void, the effect of such person receiving a majority of the votes cast is, according to the weight of American authority and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be had, and not to give the office to the qualified person having the next highest number of votes. And this view is sustained by a preponderance of the authorities cited by the author in the footnote, some of which are cited above. . . .

We think that the rule is this: The existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a willfulness in acting, when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied.

To state a truism; our theory of government by the people is upon the assumption that the people as a whole, are intelligent of their rights and interests, and are honestly and earnestly concerned in the due and wise administration of affairs, and zealously alive to the need of good and fitting men in the various places of public trust, and hold

in high esteem the privilege of suffrage, and are unready to pretermitt its exercise or to exercise it meaninglessly. It is much to presume, with this as our starting point, that any considerable body of electors will purposely so exercise their right of electing to office as that it shall be but an empty form; and that going through with outward signs of an election they will of intent so cast their ballots, as that they will be votes wasted.

Now the finding in this case is, that there was no proof of actual notice of Clute's ineligibility, nor of any facts from which notice could be implied, save that he was a supervisor.

There was but this fact, and the law upon the statute book; sufficient in themselves, as we hold, to render him ineligible.

But therefrom to give the office to the relator, it is first to be presumed, as a matter of law, that near three hundred of those who voted for Clute had knowledge of the fact that he was supervisor; had knowledge of the existence of the Act of 1853; and knew that the fact and the law, concurring thus, he was ineligible to receive and avail himself of their votes in his favor, and knew that their votes given to him were wasted, without effect upon the count.

It is to be presumed further, that knowing this, they all, though seemingly desirous of taking an effectual participation in the choice of a person to the office of superintendent, deliberately so acted as that they are assumed to have persisted against knowledge; determined to "do nothing but tender their vote for him."

It is not in accordance with common sense, and we find no rule or authority so stringent as to compel us to that result. . . .

We are therefore of the opinion that the judgment of the General Term should be reversed, and that of the Special Term affirmed.

All concur.

Judgment accordingly.

4. *Voting Rights*

RIDER v. PORTSMOUTH *

67 N. H. 298. 1892

ASSUMPSIT for money paid. Facts found by the court.

The board of mayor and aldermen appointed two of its members, including the plaintiff, a committee to look after the interest of the city as affected by a bill then pending before the legislature, "in all matters where they are of the opinion it will best subserve the interest of the city or its citizens."

The plaintiff went to Concord for the purpose of obtaining changes in some objectionable provisions of the bill, expending for car fares and hotel expenses \$11.56. He also paid the further sum of \$21.50 for the expenses of three other citizens incurred in going to Concord at his request for the same purpose. The plaintiff seeks to recover these sums.

21.50. 0004

After the bill had been presented to the board of mayor and aldermen, five aldermen, including the plaintiff (five being necessary to make a quorum), approved it.

Verdict for the plaintiff for \$11.56 and interest, which the defendants moved to set aside. The plaintiff moved to increase the verdict by including the item of \$21.50 and interest.

Samuel W. Emery and John Hatch, for the plaintiff.

Ernest L. Guptill and Calvin Page, for the defendants.

SMITH, J. The vote appointing the plaintiff and another alderman a committee gave them authority to do what in their opinion would "best subserve the interest of the city or its citizens" in relation to the bill then pending in the legislature. For personal expenses necessarily incurred in the discharge of their duties each member is entitled to be reimbursed by the city, and each may maintain his separate action for the recovery thereof. The motion to set aside the verdict must therefore be denied.

The vote authorized the committee to act jointly, and if the committee had consisted of more than two members, the consent of a majority would have been necessary to bind the city by its action; but consisting of only two members, the concurrent action of both was necessary for the employment of persons at the expense of the city. It was entitled to action governed by the combined wisdom of both members. The item of \$21.50 was authorized by the plaintiff alone. If the other member had been consulted, the plaintiff might have been convinced of the inexpediency of the expenditure.

The next inquiry is, whether the action of the plaintiff has been ratified, or the claim approved. . . . It was not approved by the committee on accounts, nor by a majority of the aldermen without the plaintiff, who was a member of the board.

1160 In *Dorchester v. Youngman*, 60 N. H. 385, it was held that a citizen's pecuniary interest in a question of town affairs does not disqualify him from voting upon it. The municipal affairs of the city of Portsmouth are managed by a city council, consisting of a board of aldermen and a board of common councilmen, chosen by the legal voters in their respective wards to represent and act for them in all business matters entrusted by law to the councils. The plaintiff in his capacity as alderman acted as the representative of the people of the city. In all matters where his interest was the same as that of any other citizen his right to vote cannot be questioned. But in a matter where he had a direct personal and pecuniary interest and upon which he was re-

quired to act judicially, he was, according to well recognized legal principles, disqualified from acting. He claimed to be a creditor of the city. His claim had never been adjudicated, and the question before the board was whether his claim should be paid. Without his vote there was not a majority in favor of paying it. In *Holderness v. Baker*, 44 N. H. 414, it was held that a selectman cannot act for the town in making a loan of its money to himself. We think the doctrine of *Dorchester v. Youngman* does not apply to the facts in this case.

The item for \$21.50 not having been authorized by the committee nor approved by any committee nor by the aldermen, cannot be recovered.

Judgment on the verdict.

5. *Reconsideration: Adjourned Meetings*

STILES v. CITY OF LAMBERTVILLE

73 N. J. L. (Sup. Ct.) 90. 1905

ON rule to show cause why a *mandamus* should not issue.

DIXON, J. In pursuance of "An act to establish an excise department in cities of this State," approved April 8, 1902 (*Pamph. L.*, p. 628), an ordinance for that purpose was adopted in the city of Lambertville on March 14, 1903, and under it a board of excise commissioners was duly organized. The fourth section of the ordinance provides that "in case of the . . . resignation . . . of any member of said board . . . the common council shall appoint another person in his stead." At a regular meeting of the council, held on August 7, 1905, a member of the board sent in his resignation to take effect immediately, and the council accepted it. Thereupon, on motion, the relator was appointed by unanimous vote to fill the vacancy. Before these proceedings, the council, having under consideration an appropriation for the fire department, laid it over for one week, and resolved that when the council adjourned it would adjourn to meet on August 14, at eight o'clock in the evening, and subsequently the council so adjourned. When the council reassembled, on August 14, a motion was made to reconsider the vote by which the relator had been appointed, and that motion prevailed. On further motion, the matter of appointing a member of the excise board was left open for a month.

The Act of 1902 requires the excise commissioners to give such bond for the faithful performance of their duties as the council shall fix by ordinance, and the ordinance requires that each person appointed as a member of the board shall, before entering upon the duties of the office,

take an oath, etc., and give bond, etc., to be approved by the council. The relator took the required oath on August 8, but when, on August 14, he tendered a bond to the council, it was refused because of the reconsideration above stated. The application of the relator is for a *mandamus* ordering the council to approve his bond and give him a certificate of election.

The proposition that every deliberative assembly may reconsider any vote previously taken at the same meeting was adjudged by this court in *State v. Foster*, 2 Halst. 101. In other tribunals it has sometimes been denied (*State v. Barbour*, 53 Conn. 76) and sometimes been admitted (*Baker v. Cushman*, 127 Mass. 105). In this State it has more than once been affirmed and should be regarded as settled. *Jersey City v. Howeth*, 1 Vroom, 521, 529; *Whitney v. Van Buskirk*, 11 *id.* 463, 467. In the present case the general doctrine is expressly supported by a rule of the council, providing that "when a motion or resolution has been once made and carried . . . it shall be in order for any member voting with the majority to move for a reconsideration of the vote at the same meeting."

The next question, therefore, is whether the session of August 14 was the same "meeting" as the session of August 7.

The authorities hold that the session of a deliberative assembly, convened in pursuance of a special motion, adopted at a regular meeting, to adjourn the meeting to a stated time, is a continuation of the regular meeting, and at such session the assembly can do anything that it could have done at the earlier session. 1 *Dill., Mun. Corp.*, § 287 (225); *State v. Jersey City*, 1 Dutcher, 309, 312; *Stades v. Borough of Washington*, 15 Vroom, 605, 611; *Lantz v. Hightstown*, 17 *id.* 102, 107.

At the session of August 14th, therefore, the council legally reconsidered the vote appointing the relator, and such reconsideration annulled the appointment.

The rule for a *mandamus* must be discharged.

RECORDED ACC. BY P. MURPHY. (1887) 73/365

STATE v. PHILLIPS

79 Me. 506. 1887

AN information of the attorney general in the nature of *quo warranto*.

LIBBEY, J. At a meeting of the aldermen of the city of Ellsworth, held on the 15th of March, 1887, for the purpose of electing city officers, a ballot was taken for second assessor of taxes; and Albert G. Blaisdell was declared elected, and his election was entered of record. The meeting then took a recess till the next day, March 16, when, on motion

therefor it was voted to reconsider the election of second assessor, and a new ballot was taken, and the respondent was declared elected. Blaisdell took the necessary oath of office on the first day of April, 1887. On the foregoing facts, the court held that Blaisdell was duly elected, and that the election of Phillips, the respondent, was void, and ordered judgment of ouster against him. To which rulings exception was taken.

We think the rulings of the court below correct. The election of assessors was required to be by ballot. While a municipal body having the power of election may set aside a ballot by which it appears that an election is made, for some irregularity or illegality before the election is declared (*Baker v. Cushman*, 127 Mass. 105), we are aware of no authority which holds that, when the election by ballot is declared and entered of record, it may be reconsidered at an adjourned meeting on a subsequent day, and a new election had. When the aldermen balloted and declared the election of Blaisdell, and it was recorded, their power over the election to that office was exhausted unless he should decline to accept it. He did not decline to accept and the aldermen could not deprive him of the office except by removal in the manner provided by law. There being no vacancy in the office when the respondent was elected, his election was void.

Exceptions overruled. Judgment of ouster affirmed.

HUNNEMAN v. INHABITANTS OF GRAFTON *

10 Met. (Mass.) 454. 1845

INDEBITATUS ASSUMPSIT for two fire engines sold and delivered. Writ dated July 11, 1844. Trial before WILDE, J., whose report thereof was as follows:

Evidence was given, that at a legal meeting of the defendants, on the 11th of March, 1844, it was voted to procure two fire engines, and that a committee of five was chosen to purchase the same; that a motion was then made to reconsider said vote, and it was voted not to reconsider it; that it was then voted to instruct said committee not to exceed the sum of two thousand dollars, in procuring said engines and fixtures necessary for the same; and that it was then voted to adjourn the meeting to the 25th of said March, at *two o'clock* P. M.: That said committee, before the 25th of said March, made a contract with the plaintiffs to furnish two fire engines, for the sum of \$1974: That at a legal meeting of the inhabitants of Grafton, held on the 25th of March, 1844, at *one o'clock*, P. M., it was voted "to reconsider the vote passed at the last meeting, whereby the town voted to procure two fire engines:" It was

also "voted to choose a committee of three to inform Messrs. W. C. Hunneman & Co. of the vote of the town, and to leave it in the hands of the committee to settle with them according to their best skill and judgment:" That the defendants met at two o'clock, on the same day, pursuant to adjournment from the 11th of said March, and "voted that the committee chosen to procure engines be discharged from any further duties:" That the votes passed at the meeting aforesaid, held at one o'clock, were communicated to the plaintiffs on the 27th of said March, by the committee then chosen for that purpose.

The plaintiffs offered to show that the aforesaid meeting, held on the 25th of March, 1844, was after they had made some progress in the completion of their contract to make the engines.

The judge suggested a doubt, whether the action could be maintained, and a nonsuit was entered by consent, subject to the opinion of the whole court.

J. P. Rogers and *J. J. Clarke*, for the plaintiffs.

C. Allen and *Bacon*, for the defendants.

HUBBARD, J. It is objected that the committee to procure the fire engines could not legally proceed to act, till the meeting at which they were appointed was dissolved, as the town might, at the adjournment, reconsider their vote and rescind the power conferred; and that in fact, at a meeting called for the purpose and held at a previous hour, on the same day with the adjourned meeting, a vote was reconsidered and the committee discharged. And it is contended that it was incumbent on the plaintiffs to ascertain the extent of the authority of the committee to bind the town, before contracting with them, and to take notice of the adjournment. But we are of opinion that the authority conferred upon the committee was not conditional, nor dependent on any further action of the town, on the day of adjournment; that they, having been appointed to procure the engines, without any restriction, except as to the cost thereof, had a right to go on immediately and contract for the engines; and that, acting within the powers given, their proceedings were binding on the town. To have been affected by the adjournment, the subject should have been suspended, or the committee directed not to proceed till the meeting was dissolved. An adjournment is for the purpose of acting upon matters not determined, or not yet brought forward for action, and not to revise matters disposed of and finished. And though matters acted upon, where no step has been taken in which the rights of others are affected, may be reconsidered and rescinded; yet when the subject of the votes has been so far carried into effect that rights and duties have grown out of such action, the town cannot, at an adjournment of the same meeting, by a mere reconsideration of their previous act, destroy or affect any right thus vested.

As a further answer to this objection, it is insisted by the plaintiffs that, immediately after the votes authorizing the purchase of the engines and the appointment of a committee for the purpose, a further vote

was passed, that they would not reconsider those votes, and that such vote was binding on the town; so that there was no legal right to rescind them at the adjourned meeting. But the case before us requires no specific decision on the legal effect of such a vote not to reconsider. The consequence probably was, to assure the committee, as well as the plaintiffs (if communicated to them), that the town would not rescind their doings; but we are strongly inclined to think it could not bind the town, so as to prevent a future action thereon, if no intermediate steps had been taken. The technical rules of a legislative body, framed for its own convenient action and government, are not of binding force on towns, unless such rules have been so acted upon and enforced by the town in their regular meetings, as to create a law for themselves and binding on the inhabitants. . . .

Though the revocation of the authority, and notice thereof to the plaintiffs, and the refusal to accept the engines, furnish no substantial ground of defence to the plaintiff's claim for damages, yet they do create an objection to the plaintiff's form of declaring in the case. There was no acceptance of the engines. The delivery at the depot of the railroad did not, under the circumstances, constitute an acceptance. *Atkinson v. Bell*, 8 Barn. & Cres. 277, and 2 Man. & Ryl. 292. *Anderson v. Hodgson*, 5 Price, 630. *Hilliard on Sales*, 322. . . .

The credit also had not expired when the action was commenced. . . . The remedy of the plaintiffs, therefore, is by action on the special contract, and not in *indebitatus assumpsit*. . . .

The nonsuit is to stand, unless a motion should be made to take it off and amend the declaration. Such a motion may be granted on terms.

6. *Executive Veto or Approval*

ERWIN *v.* JERSEY CITY †

60 N. J. L. 141. 1897

ON error to the Supreme Court.

MAGIE, C. J. . . . In conformity with the views expressed in the prevailing opinion of the Supreme Court, a verdict was directed in favor of the city.

The pleadings disclose that Erwin's action was brought to recover the compensation attached to the office of corporation attorney of the city of Jersey City for the period of three months.

At the trial Erwin claimed (1) that he had been duly appointed to that office. . . .

It is, however, further contended that the appointment of Erwin by the board of finance gave him no apparent title to the office of corporation attorney, because, as is claimed, that action required the approval of the mayor of Jersey City, which approval, it appears, was refused. This contention is put upon the provisions of section 19 of "An act for the government of cities of this State," approved April 6, 1889, *Pamph. L.*, p. 187. Although this act has been pronounced by this court to be a general law, it is called in the brief of counsel the new charter of Jersey City. Assuming, although there is no proof of it, that the act in question is in force in Jersey City, we will consider the contention thus made.

By the provisions of the section above referred to, the mayor of the city is given authority to veto the "acts" of any board of the city, and it is required that copies of all resolutions and "other matters" shall be furnished to the mayor for consideration, and the board is empowered to pass any vetoed resolution or other matter over the mayor's objections, by a two-thirds vote. It is insisted that a resolution appointing to office is subject to the mayor's veto.

If a literal construction be given to the provisions of the section thus appealed to, it is obvious that the business of any municipal board will not only be hampered and delayed, but practically be rendered impossible to be performed. Resolutions to approve minutes, to lay on the table, to postpone, to adjourn, and numberless others, are resolutions expressing acts of such boards. If all such acts are to be presented to the mayor, and only be effective upon his approval or their passage over his veto, the business of the board could not be done. It is so incredible that the legislative intent was to produce such a result that a restricted construction of these provisions, consistent with their practical operation, should be adopted if possible.

A question identical with that thus presented was considered by the Supreme Court in *Haight v. Love*, 10 Vroom, 14. By the provisions of a section of a former charter of Jersey City, the mayor was given power to veto the "action" of any municipal board, and all ordinances and resolutions were required to be sent to him for consideration. If any were vetoed, it was provided that the action resolved upon or ordained should be void, unless such board should sustain it by a two-thirds vote at its next meeting. The point presented in the case was whether the appointment, by the board of finance, of a city collector was required to be presented to the mayor for his approval. The opinion of the court was delivered by Mr. Justice Dixon, who justly pointed out the impracticability of a literal construction of those provisions, and who concluded that the *actions* which the mayor might approve or veto must belong to the class of acts usually performed by such bodies by resolutions or ordinances, viz., acts of a legislative character. As appointments to office were not of that character and were not usually made by resolution, but rather by ballot or *vive voce*, the

legislation then under consideration was construed as inapplicable to acts of such boards appointing to office, and it was held that such acts did not require the approval of the mayor.

With the views expressed in that case I am in entire accord, and I think them applicable to the statutory provisions now under consideration. The absurd result of a literal construction of those provisions tends to induce the belief that such construction was not within the legislative intent, and the fact that it is required that the mayor is to be informed of "resolutions and other matters" for consideration in respect to his approval or veto, justifies the conclusion that the "acts" which are thus to be submitted to him for approval are only such as are usually performed by such bodies by resolutions or other similar evidences of action. "Other matters" is a phrase not very aptly chosen, but, in my judgment, it can only mean matters of a similar character to resolutions, of which I know none but ordinances. The result is that the power to appoint a corporation attorney, if only apparent, was conferred upon the board of finance, and their appointment did not require the mayor's approval. . . .

The judgment below must, therefore, be reversed.

CHAPTER VIII

CONTRACTUAL LIABILITIES

1. *Officers as Agents*SANBORN v. NEAL *et als.**

4 Minn. 126. 1860.

THE three defendants are sued upon a promissory note which reads "One year after date, we, as trustees of School District No. 10, in Rice County, and Territory of Minnesota, promise to pay," etc., and is signed by them individually without description after their names. Defendants had a verdict, and plaintiff appealed. The grounds of the appeal are stated by the court.

H. C. Lowell & Co. and Batchelder & Buckham, for appellant.

Davis & Tanner and *Cole & Case*, for respondents.

EMMETT, C. J. This case turns mainly upon the question, whether the court below erred in holding that parol evidence might be received to show that the defendants executed the note on which action is brought in their official capacity, as the trustees of school district No. 10, in Rice County, and not as individuals; that the note was given, not for their own debt, but the debt of the district, that it was the intention of the parties to bind the district only — and that it was so understood by the plaintiff at the time, and the note received by him as the note of the district. . . .

To write out at length the legal effect of such a signature would be but to repeat the very language of the note itself; and as the primary object, in all cases, is to ascertain what the parties really intended to declare by the language used, it should make no material difference whether this intention appears in the signature or the body of the instrument. We do not think that the defense set up in this case, is at all inconsistent with a rational interpretation of the terms of the note. As before remarked, it is at least doubtful in what capacity the defendants promised, and where the interpretation is doubtful, the intention of the parties furnishes the only sure criterion.

Another position assumed by the plaintiff is, that the defendants had no authority to bind the district by such a contract, and, having failed to render their principal liable on the note, they are themselves obliged to pay it. There is abundant authority for a general proposition of

this sort, but there is also an admitted exception in favor of public agents acting within the scope of their general powers.

It is not thought necessary to decide or discuss whether the defendants were authorized to make this note on behalf of the district nor whether the district has not, since the making thereof, so far ratified the act of the trustees, as to become liable to the plaintiff in any event. We are satisfied that trustees of school districts are public agents, within the meaning of the exception to the rule above referred to. 15 Pick. 35; 18 Johns. 124; 3 Conn. 564; 10 Conn. 338; 14 Conn. 248; 21 Conn. 627; 22 Conn. 379; 1 Cranch, 345. When public agents, in good faith, contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves, they do not become individually liable, unless the intent to incur a personal responsibility is clearly expressed, although it should be found that through ignorance of the law they may have exceeded their authority. In the whole list of cases cited to this point, there is not a reason given for this doctrine, which does not apply with full force to trustees of school districts and all other officers acting on behalf of the public, whether they act for the public at large, or that portion only embraced in a particular district. In this, as in all other cases, the intention of the parties governs, and when a person, known to be a public officer, contracts with reference to the public matters committed to his charge, he is presumed to act in his official capacity only, although the contract may not in terms allude to the character in which he acts, unless the officer by unmistakable language assumes a personal liability, or is guilty of fraud or misrepresentation. Being a public agent, with his powers and duties prescribed by law, the extent of his powers is presumed to be as well known to all with whom he contracts as to himself. When therefore there is no want of good faith, a party contracts with such an officer with his eyes open, and has no one to blame if it should afterwards appear that the officer had not the authority which it was supposed he had. Were the rule otherwise, few persons of responsibility would be found willing to serve the public in that large class of offices, which requires a sacrifice of time and perhaps money, but affords neither honor nor profit to the incumbent.

Where one acts as the agent of a private person, the rule is different. There, the authority is known only to the agent and his principal. He is, therefore, with reason, held personally responsible, if he fails to bind his principal, because he is bound to know the extent of his authority, while the party with whom he contracts is not presumed to know anything concerning it. . . .

JUSTICE ATWATER dissents from the foregoing opinion.

Judgment affirmed.

MAYOR AND CITY COUNCIL OF BALTIMORE v. ESCHBACH *

18 Md. 276. 1862

APPEAL by defendant, after verdict and judgment against it, from the Superior Court of Baltimore City. The action is for damages, and is based upon a contract by which the plaintiff undertook to grade and pave a portion of Hull Street. The contract was entered into on behalf of the defendant city by the city commissioner with the approbation of the mayor. Other material facts, and the ordinance under which the contract was made, are given in the opinion.

G. L. Dulany, for the appellants.

I. N. Steele and Geo. M. Gill, for the appellee.

COCHRAN, J. . . . The city commissioner, by the 1st, 34th, 35th and 36th sections, of Rev. Ord., No. 15, of 1850, with the approbation of the mayor, is vested with power and authority to enter into and make contracts for grading and paving, and to assess taxes therefor, in two classes of cases only: first, when the proprietors of a *majority* of the feet of ground, bounding and fronting on any *condemned street, lane or alley*, make application to him in writing, to have such street, lane or alley, graded and paved; and second, when *all* the proprietors of the ground fronting on a street, lane or alley, *not formally condemned*, make a like application for grading and paving. One or the other of these applications, as the case may be, must be made, in accordance with the provisions of the ordinance, to initiate his jurisdiction and authority in any case of grading and paving; without such an application he is entirely destitute of the official character and power, in and by which alone he can take any lawful proceeding or make any valid contract for such work. The power conferred on the mayor, to approve of his determination to grade and pave, and also of his contracts for grading and paving, is limited to the same classes of cases, and will be controlled by the same conditions and principles. As it is admitted in this case, that Hull Street, from Fort Avenue to the Port Wardens line, was never formally condemned, and that the application to have it graded and paved was made by only a part of the proprietors of the ground binding and fronting thereon, it is obvious that the application was not sufficient to bring the case within the jurisdiction conferred by the ordinance on the commissioner, nor to give him any official discretion or authority to take any proceedings, or make any contract respecting it. The fact, that the contract made, related to a subject within the general scope of his powers, does not make it obligatory on the appellants, if there was a want of the specific power to make it. Although a private agent, acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal, the rule, as to the effect of the like act of a public agent, is otherwise. The city com-

" C. S. . . .

" . . .

219 Dec.

349-50

missioner, upon whose determination to grade and pave the contract was made, was the public agent of a municipal corporation, clothed with duties and powers, specially defined and limited, by ordinances bearing the character and force of public laws, ignorance of which can be presumed in favor of no one dealing with him on matters thus conditionally within his official discretion. For this reason, the law makes a distinction between the effect of the acts of an officer of a corporation, and those of an agent for a principal in common cases; in the latter, the extent of authority is necessarily known only to the principal and the agent, while, in the former, it is a matter of record in the books of the corporation, or of public law. A municipal corporation cannot be held liable for the unauthorized acts of its agents, although done *officii colore*, without some corporate act of ratification or adoption; and, from considerations of public policy, it seems more reasonable that an individual should occasionally suffer from the mistakes of public agents or officers, than to adopt a rule, which, through improper combinations and collusion, might be turned to the detriment and injury of the public. 17 Mass. 29; 19 Pick. 516; *Lee v. Munroe*, 7 Cranch. 366. The case of the *Mayor and City Council v. Marriott*, 9 Md. Rep. 160, we think establishes no principle inconsistent with those recognized as governing this case, as it turned entirely upon the construction of the Act of 1795, ch. 68, which was held to impose an obligation on the corporation to prevent and remove nuisances, for disregarding which it was made liable.

The appellee, in making the contract in this case, was bound to know the whole extent of the commissioner's power to make the appellants a party to it, and more especially as the ordinance, from which that power was derived, by a particular reference, was made a part of the contract itself. Its execution, in mutual mistake of an important jurisdictional fact, with the stipulation, that the appellants in no case whatever should be responsible for private work done in its performance, inserted in compliance with the provisions of the ordinance, compels the appellee to accept the legal result of the mistake and the hazards consequent upon the irregularities of the proceedings through which the contract was made. The determination of the commissioner to grade and pave cannot be held as conclusive of the right to do so, and parties who presume to act upon it, must do so at their peril. 8 Md. Rep. 352.¹ . . .

Judgment reversed.

¹ In *Dalafeld v. Illinois*, 26 Wend. 192 (1841), a public officer had issued bonds upon terms slightly different from those upon which he was authorized by statute to issue them. VERPLANCK, S., at p. 222, said: "When the agency is created or conferred by a written instrument, and grows wholly out of it, the nature and extent of the authority must be ascertained from the instrument itself, and cannot be varied or enlarged by usage. The courts have wisely given liberal constructions to the powers of agents authorized to deal generally in commercial matters as factors or brokers, or in any way held out to the world as having an unqualified authority to act for their principal in all matters coming within the range of their employment. But they have never questioned the strict application of the rule where the agent is employed specially for any particular transaction. There, if the agent exceed his special and limited authority, 'the principal,' according to Judge Story, 'is not bound by his acts, but they become mere nullities so far as he is concerned.' This is particularly applicable

2. *Corporate Consent*MAYOR AND CITY COUNCIL OF NASHVILLE, IN ERROR, v.
HAGAN, ADM'X *9 *Baxter (Tenn.)* 494. 1876

ACTION brought by John C. Hagan to recover from the city the value of the use of an improvement, invented and patented by him, for increasing the pressure of the water supply when in use for extinguishing fire; which the plaintiff alleges was attached to the city water-system under a contract with the city whereby the city agreed to pay the expense of manufacturing the apparatus, and such compensation to the plaintiff as the use of it was reasonably worth. There is also a common count for work and labor done, materials furnished, and goods and wares sold, etc. The defendant pleaded a general denial, and also that it had complied with all covenants made with the plaintiff in respect to the matter alleged. Upon trial there was verdict and judgment in favor of the plaintiff for \$12,000. The city took exceptions and appealed in error to this court.

It appeared that under the system then existing, the city was supplied by means of a reservoir, into which the water was forced from the river by pumps driven by steam, and that from the reservoir the water was carried through pipes into the city by the weight and pressure of the water in the reservoir. Hagan's improvement consisted of a large pipe laid down across the bottom of the reservoir, connecting directly the supply pipe from the pumps with the main pipe leading into the city, and into this was inserted certain valves, standpipe and air-chamber; the result of which, it was claimed, would be, when occasion required, to force the water directly from the pumps into the pipes leading through the city.

The only evidence of an express contract with the city was that Grant, the chairman of a standing committee known as the water-works committee, after discussing the device with Hagan, recommended it to the mayor and city council, and secured an appropriation for constructing it. He testified "The understanding with the committee and mayor and city council was, that Hagan should be paid what his machine was worth, should it prove a success." In explanation of this, which appears in the deposition of Grant, read by the plaintiff, the defendant read

where the agency is created by a written instrument, or authority known to the party dealing with the agent as the source of his authority, and directing and regulating its object, extent and exercise. Thus, in *Gardner v. Balis*, 6 T. R. 591, a case decided by the King's Bench, after consulting with the judges of the Common Pleas, and in *Hogg v. Smith*, 1 Taunt. R. 349, it was decided that written instruments, setting forth the power, must be strictly pursued, and cannot be enlarged by evidence of usage. Such is peculiarly the case here. The whole authority of the public officers who negotiated the loans is created, controlled and regulated by several public acts of the State of Illinois, which formed the basis of the negotiation."

244 *Reynolds v. ...* (13) *Reynolds v. ...*

another informal deposition or affidavit given by Grant previously, in which he says: "The understanding with the mayor and a large majority of the members of both boards, with whom I frequently talked about this matter, was always clear and distinct, that that or any succeeding administration would do you (meaning Hagan) the justice to allow you what your machine was worth if you made it a success."

There was proof that the other members of the committee assented to the action of Grant; but their understanding as to what was to be paid to Hagan was very indefinite. The machinery, constituting Hagan's improvement, was manufactured under a contract entered into between Grant, chairman of the water-works committee, on behalf of the city, and J. M. Brennan & Bro., the manufacturers, under the supervision of Hagan, and the price agreed upon was paid to the manufacturers by the city authorities. The improvement of Hagan was put down, and a time was fixed to test it; and the mayor, city council, and citizens were invited to the test. Some of them were present and pronounced themselves satisfied with the improvement, and declared it a success; and the proof shows that the flow of water was greatly increased in those portions of the city where there had been a deficiency.

Instructions by the judge, and his refusals to instruct, are stated in the opinion.

MCFARLAND, J. . . . The first question was whether the water-works committee had the power to bind the city government, by a contract of this character. We think unquestionably it had not. The power to make a contract of this character, for the introduction of a new and expensive improvement, is equivalent in its character to the power to levy, collect and disburse taxes, inasmuch as, if the contract be valid, it must be complied with, and the price agreed to be paid must be raised by taxation, and paid out under the appropriations of the proper city government. The power to make such a contract, being equivalent in general to the power to levy and disburse taxes, must be exercised in the same manner and by the same authority, that is, by a corporate act. The city government may, by general laws and ordinances, modify this rule and give to the committees power to make contracts in some instances. Under the ordinances passed by the city government and read on the trial, it is expressly provided that the standing committees may recommend improvements involving the expenditure of money, but no money shall be paid out except under authority of the city council, or under existing laws; "Provided that the water-works committee shall not be prevented in case of emergency from making all necessary expenditures to keep the water works in good repair and condition, and in active operation." It is clear, however, as we think, that this proviso gave no power to the water-works committee to bind the city by contract for the introduction of a new system of water-works, involving an expenditure of several thousand dollars. The power was, in case of emergency, to make expenditures to keep the existing water-works in

repair and in operation; but this was the introduction of a new system in part, involving a large expenditure. There was ample time, from its nature, to refer the matter to the council and it was therefore not a case of emergency.

The circuit judge was requested by the defendant's counsel to instruct the jury that the water-works committee could bind the city by contract, only in case of emergency in the sense of the ordinance read; and emergency meant something pressing and not admitting of such delay as would suffice to bring the matter before the council. This the court declined, but said that any contract the committee made for the purpose of supplying the city with water would be valid *prima facie*, as the committee were to judge of the necessity; that it might be shown, however, that they had transcended their power. How this was to be shown was not explained. As we have intimated, we think this was error. The jury should have been told that the committee could only contract for expenditures in case of emergency, for the purpose of keeping the water-works in repair and in operation. That this did not give them the power to contract for the introduction of a new system involving a large expenditure. That this, from its very nature, was a matter to be referred to the city council. But this instruction and refusal of the defendant's request would not, of itself perhaps, be of so vital importance, for the reason that the judge in the charge did, in substance, tell the jury, that the committee had not the power to make the contract. He said: "If the proof does not show that the plaintiff had made the specific contract with the city council, but made it with the water-works committee, and the proof shows that after the test was made and the water-works committee expressed themselves satisfied with the result, it would then be necessary, in order to make it binding on the corporation, that the mayor and city council should take some action upon the matter, and either reject or affirm it." He continues, however, "but if the proof should fail to show that there was any action by the mayor and city council disaffirming or affirming the contract, and it should appear that the mayor and city council had the knowledge of all the material facts in relation to the contract, and of the test of its results, and failed within a reasonable time to disaffirm what the committee had done in the matter, the court instructs you that this would be a ratification of the contract upon the part of the mayor and city council." In this connection his honor was asked to instruct the jury, that the ratification could only be by the action of the two boards of aldermen and councilmen, approved by the mayor; and that the mayor and members of the council could not commit or estop the city by any conduct or expressions of theirs at the water-works at any time. These instructions were refused. We hold that in the latter clause of the charge above given, and in the refusal, his honor was in error.

We do not say that a ratification may not arise from the corporate acts of a city government which are inconsistent with any other suppo-

sition, although the contract was without authority and although there was no direct vote of ratification. This is illustrated by the case of *Paterson v. The Mayor and Council of New York*, 13 New York Court of Appeals, relied upon by plaintiff's counsel. In that case it appeared that the committee on markets had referred to them the subject of rebuilding the Washington market. One of the committee employed the plaintiff to draw very elaborate plans of the proposed buildings. The plans were afterwards adopted by the proper city authorities in due form, and the building ordered to be erected. This was held to amount to a ratification. It was conceded that the contract was without authority, that it would require a legislative act to make or ratify the contract. It will be observed that the ratification resulted from the action of the authority in adopting the plans of the plaintiff and taking the necessary steps to erect the building; but this was a corporate act, passed in due form by both chambers of the city government, as other ordinances or legislative acts were adopted. We think no well considered cases can be found holding that a contract of this character, which could only be made in the first instance by the act of the city authorities in their corporate capacity, can be ratified by the failure to take formal action repudiating the contract, notwithstanding members of the city council have knowledge of the facts. In the case of *The State v. Ward & Briggs*, before this court at December term, 1871, one of the questions was, whether certain portions of a contract for leasing or hiring out the convict labor of the penitentiary, in which the commissioners upon the part of the State had exceeded their authority, had been ratified by the legislature. It was held, that as the commissioners acted under an act of the legislature, the ratification must have been by a legislative act. Chief Justice Nicholson, delivering the opinion of the court, said: "It is not enough that the individual members of the legislature should have had knowledge of the existence of the illegal stipulations in the contract, and should acquiesce passively therein; but to amount to a ratification, they must take some definite action as an organized legislature, either expressly recognizing and adopting the illegal stipulations, or some definite action as a legislature, from which an intention to ratify them may be fairly inferred."

In support of this Judge Nicholson refers to 18 Maryland R., 282; and 20 Maryland R., 14; in which cases it was held that the ratification of unauthorized acts by municipal corporations must be by corporate acts; and to 16 California, 23, in which it is said: "To ratify is to give validity to the act of another. A ratification is equivalent to a previous authority, it operates upon the act ratified in the same manner as though the authority had been originally given." "It follows," continues the authority, "as a consequence, that where the authority can be originally conferred only in a particular form, the ratification must follow the same form or mode; . . . where an authority to do any particular act upon the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance." Judge Nicholson adds,

that "the reasons on which the rule rests, as to a corporation, apply with equal force to a legislature, the corporation being in this respect a *quasi* legislature."

It is argued, however, for the plaintiff, that, even conceding this error, the judgment should not be reversed, because it is said the verdict was proper under the common count; but we cannot determine under which count the jury rendered their verdict, and cannot say that the error may not have prejudiced the defendant; and besides we will not now undertake to say, that the verdict was proper under the common count. We are referred to the case of the *Gas Company v. San Francisco*, 9 California. In that case it appeared that the gas company had furnished gas to the city under a contract, for which judgment was rendered without objection; and that, without any contract, the company furnished the city with gas, in addition, to light the city hall and engine houses for nearly two years; the bills, amounting to over \$10,000, were rendered monthly to the common council, and a portion of them audited and allowed, but not paid; that the gas was used nightly in the chambers of the common council during its sittings, in the office of the mayor, comptroller, treasurer, police officers, etc. The case was decided in favor of the right to recover, upon the ground that under the California statute the answer to the complaint was insufficient.

In the opinion of Judge Field, however, there are remarks which, although *obiter*, we are not disposed to controvert. He says: "The respondent denies the right, upon the sole ground that there was no evidence of any ordinance of the common council authorizing the furnishing of the gas. The proposition of the defendant is that a municipal corporation can incur no liability otherwise than by ordinance. The position to its full extent is not tenable; under some circumstances a municipal corporation may become liable by implication; the obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against an individual the law implies a promise to pay, and the implication extends equally to corporations. He further says that where the contract is executory the corporation cannot be bound unless made in pursuance of provisions of its charter; but where the contract is executed and the corporation has enjoyed the benefit of the consideration, an *assumpsit* will be implied. It will be presumed, for the purpose of justice, that authority was properly delegated to the officers, or that their acts were ratified." Conceding that these remarks were proper as applicable to a case like the one then before the court, and not deciding whether it be in conflict with the opinion of this court in the case of *Ward v. Briggs*, they certainly do not apply with the same force to the present case. Where property is delivered and used, as in that case, the clear and necessary inference, as well as the natural sense of justice, would be that it was to be paid for; but here the property itself, that is, the ma-

chinery, was paid for by the city. The plaintiff does not sue for his labor in superintending the building, but for the value of his right patented. While the delivery and use of property would ordinarily raise an implication that it was to be paid for, the use by the defendant of a machine for which it had paid, would not necessarily raise an implication that it was to pay for the patent right. The plaintiff might, in such cases, permit the building and use of such patented machine by the defendant at its own expense, as a means of testing an untried improvement and advertising it to others; whether in such cases the patentee is to have pay for his patent would depend upon his contract. If he should permit an individual to build, at his own expense, and use such patented machine, without any contract that he was to have pay for the patented right, he would be without remedy, and the same rule would apply to a corporation.

Whether there might be in such cases grounds for a court of equity enjoining the use of such machine, where the permission was given under a misapprehension or the belief that the contract for pay was valid, we need not decide. We only hold that the use of such patented machine does not necessarily imply, in the absence of a contract, that the right is to be paid for; and we, of course, do not decide that the improvement that the defendant continued to use, is in substance, the improvement covered by the plaintiff's patent.

The judgment must be reversed and a new trial granted.

POPE MANUFACTURING COMPANY v. GRANGER, CITY
TREASURER

21 R. I. 298. 1899

TILLINGHAST, J. This is an action of *assumpsit* to recover the sum of \$50 for a bicycle. The agreed statement of facts shows that at a meeting of the committee of the board of aldermen on the health department held September 27, 1897, it was voted that the superintendent of health be authorized to purchase a buggy with rubber tires, at a cost not to exceed \$200, and a bicycle not to exceed \$50; that on the same day the superintendent of health purchased of the plaintiff a bicycle for \$50, which was on the same day delivered to Walter J. Lewis, inspector of nuisances of the health department; that on September 30th of the same year, at a meeting of said committee, the schedule of bills for the month of September, containing the bill of plaintiff for \$50, was examined and approved; that on October 7th of the same year, at a full meeting of the committee on the health department, a commu-

nication from the city auditor relative to the bill of the plaintiff for said bicycle, was read, and that after a free discussion it was voted that the committee see no sufficient reason for rescinding their resolution of September 27, authorizing the purchase of a bicycle at a cost not to exceed \$50, and voted that the city auditor be requested to audit the bill of the plaintiff, which was returned with his communication of October 2d for further consideration; that on October 14, 1897, the city auditor presented to the joint standing committee on accounts of the city council, without his approval, the aforesaid bill of the plaintiff, sent to him with the approval of the superintendent of health, the committee on health, and the board of aldermen; that the auditor's reason for not approving the bill was that the city council had not authorized the use and purchase of bicycles, and that such authority of the city council should first be obtained. Said joint standing committee afterwards voted to refer the bill to the city council, which was done, and, after some discussion by that body, it was indefinitely postponed. It further appears that at the time the bill in question was contracted there was an unexpended balance of an appropriation made by the city council for the health department, sufficient in amount to pay said bill. In view of these facts, the question presented for our decision is whether the defendant is liable on said contract.

The defendant contends that the city council alone has the right to expend the money of the city, and to provide how it should be expended. He relies for this position upon clause 13, p. 8, of the city charter (Ordinances of Providence, Revision of 1887), which provides that "the city council shall take care that moneys shall not be paid from the treasury unless granted or appropriated." His contention in this regard is doubtless correct. The city council has the entire control of the moneys belonging to the city, and no committee of the council or of either branch thereof has any authority, except as authorized by vote or ordinance thereof, to incur any liability or expend any money. But, while this is so, we understand that after an appropriation has been made by the city council for a certain department, — such, for instance, as the poor department or the health department, — that branch of the city council or that committee thereof having charge of such department may lawfully incur debts and audit bills to be paid out of the appropriation therefor. Chapter 14 of the Ordinances of 1887 (see page 406 *et seq.*) clearly recognizes the right of the various departments and committees thus to contract debts, so long as they keep within the limit of the appropriations made. Section 2 reads as follows: "In every financial year the specific appropriations for the several objects enumerated in the ordinance making appropriations for such year, shall be deemed to be the entire amount to be expended during such financial year by the several committees having charge of the respective appropriations: and after the passage of such ordinance no expenditures shall be authorized for any object unless there be sufficient money in the treasury, unappro-

priated, to meet such expenditures, or unless provision for the payment thereof shall be made by transfer from some of the appropriations already made, or by directing the city treasurer to borrow the money required therefor." The board of aldermen is *ex officio* the board of health for said city. General Laws R. I., ch. 40, § 13. As a board of health, they have sole charge of all matters within their jurisdiction; and, when an appropriation has been made to enable them to discharge their duties, we fail to see any reason why they may not lawfully contract bills, in their discretion, to be paid out of such appropriation. They are sworn officials of the city, they constitute an important branch of the city government, and are charged by law with the discharge of very important duties, especially when acting as a board of health, and it is certainly to be presumed that they will intelligently and faithfully perform such duties; and unless it clearly appears that a given act like the one in question is either beyond their jurisdiction, or is a palpable abuse of their discretion, it is binding upon the city, and cannot be questioned in a court of law. In the case at bar, the purchase was made by authority of a committee of the board of health; the bill was approved by said committee, by the superintendent of health, and also by the board itself; and there was money subject to the control of said board sufficient to pay the bill.

It is true, as said by defendant's counsel in his brief, that there was no resolution of the board declaring that a bicycle was necessary, and directing its purchase, as he says was the custom in other cases. But the subsequent ratification of the purchase by the board was equivalent to a resolution authorizing the same. In short, the purchase was in effect the act of the board as fully as if it had been made in pursuance of a resolution to that effect.

As to the auditor's reason for not approving the bill, viz., that the city council had not authorized the purchase and use of bicycles, and that such authority should be first obtained, we reply that, while ordinarily, it is doubtless better for any committee or department of the city government to obtain special authority for the purchase of any materials which are of an entirely different character from those previously or usually called for or considered necessary in prosecuting the work of such department, yet we cannot say, as a matter of law, that it was necessary that such authority should have been obtained in this case. We think the bill in question was lawfully contracted, and that the plaintiff is entitled to judgment for the amount claimed, with costs.

Case remitted to the district court of the sixth judicial district, with direction to enter judgment for the plaintiff for the amount claimed and costs.

BARNARD v. SANGAMON COUNTY

190 *W.* 116. 1901

MR. JUSTICE CARTWRIGHT. The board of supervisors of the county of Sangamon, appellee, rejected the claim of George D. Barnard & Co. appellants, for two justice's dockets, one marriage register, and blank books for the assessment of lands, lots, and personal property in said county for the year 1899, made under the forms required by the Act of 1898 for such assessment and delivered to said county. Appellants appealed from said decision to the circuit court of said county, where, a jury having been waived, matters of law and fact were submitted to the court. There was a trial, and the court found the issues for the appellee and entered judgment accordingly. From that judgment appellants appealed to the Appellate Court for the Third District. The judgment of the circuit court was affirmed by the Appellate Court, and a certificate of importance was granted and this further appeal prosecuted.

There was no controversy at the trial over any matter of fact, and the facts as proved and conceded are as follows: There are standing rules of the board of supervisors, entered of record, providing, in substance, that no supervisor, committee of the board or county officer shall make any contract for supplies exceeding \$75 without a public letting to the highest responsible bidder after publication of notice; that no blank books, stationery, or other articles used by county officers shall be furnished except on the order of the officer requiring the same, which shall accompany the bill when presented to the county board for allowance, and that all supplies and printing needed by the county shall be purchased of resident county printers and merchants, provided they can be obtained there as cheaply as elsewhere. Before 1894 the rule had provided for a public letting when the amount exceeded \$25. The blank books in question were made and delivered by plaintiffs upon the order of the county clerk, and there had not been any resolution or express authority of the board of supervisors authorizing him to make the purchase. The books were ordered in August, 1898, to be used in 1899, and were delivered the last of November, 1898. It was proper and necessary to have the books in advance, so as to have them thoroughly dry and seasoned and fit for use. If purchased and used at once, when damp from the glue and paste, they would be apt to warp and get out of shape and perhaps come apart. There was no want of good faith on the part of the plaintiffs, and the quality and fitness of the books for use are not questioned. The books were afterward refused by the county and were not used, but were packed up and held subject to the order of plaintiffs, who did business in St. Louis, Missouri. The provision for a public letting of contracts had not been observed.

Counties (1898-1899)

It had been the custom of the county to purchase blank books, stationery, and supplies in the same manner that these books were ordered and purchased, at least since the year 1884. The method of doing the business during that time was for the county clerk to order and purchase such supplies as would be needed in his office, and no order or contract was ever made after public notice or bidding. Bids were made for all such purchases, and were certified to by the clerk and presented to the board and paid. From 1892 until the time of this contract, — a period of about six years, — the plaintiffs had been in the habit of selling to the county in that way, through orders of the county clerk, blank books, blanks and lithograph work, such as county orders and marriage licenses, and none of the purchases so made, nor any such transaction of the county clerk as agent for the county, was ever questioned.

The only controversy between the parties is whether, under that state of facts, the county is permitted to deny the authority of the clerk to enter into the contract as its agent, and the defense against the claim is, that the county is not bound for want of express authority of the county clerk to make the contract. Propositions of law were presented to the court by the parties in accordance with their respective claims. The court refused the propositions submitted by plaintiffs that the defendant might be estopped by the action of its board of supervisors in having held out the county clerk as authorized to act for the board in the purchase of supplies. All propositions presented by plaintiffs were refused and those offered by the defendant were held to be the law.

An individual or private corporation, under the same circumstances, would not be permitted to deny the authority of a person held out as agent. One who deals with an agent must ascertain his authority; but such authority is commonly inferred from the extent of the usual employment of the agent, and not from an inspection of a written authority or knowledge of an express appointment. The rule that the principal shall be bound by the acts of an agent within the apparent scope of his authority in the business confided to him, is indispensable to justice and to meet the common conditions and exigencies of business. To permit a principal to repudiate an agency which he has led others to believe existed, would be inconsistent both with morals and public policy and invite fraud and imposition upon persons dealing with him in good faith.

This rule is not questioned, but it is contended that there is a difference in the case of *quasi* municipal corporations like counties, and that they are at liberty to repudiate contracts which are made without express authority of the board. We do not understand that to be the rule, but are of the opinion that the courts are as ready to support a just claim against a municipal corporation as any other party. In *Seagraves v. City of Alton*, 13 Ill. 366, where a duty was enjoined by law upon the city, a contract was even implied on its part and *assumpsit* sustained where it had expressly refused to perform the legal obligation

resting upon it, and where it, in fact, made no contract but refused to make one. A municipal corporation is never estopped to deny its right to make a contract, but the doctrine of estoppel is applied to it when acting in its private, as contradistinguished from its governmental, capacity, wherever the act is within its chartered powers. *County of Cook v. Harms*, 108 Ill. 151; *City of Chicago v. Sexton*, 115 *id.* 230. The purchase of the blank books in question is not only within the powers of the defendant but is a duty enjoined upon it by statute. Section 289 of the Revenue Act (Hurd's Stat. 1899, p. 1442) is as follows: "The county board shall direct the county clerk to procure all necessary books and blanks required by this act to be used in the assessment of property and collection of taxes, at the expense of the county." In section 26 of the act in relation to counties, among the duties of the county board is the following: "To provide suitable books and stationery for the use of the county board, county clerk, county treasurer, recorder, sheriff, coroner, and the clerks of said courts." The board of supervisors is entrusted with the business affairs of the county, and in the transaction of such business may appoint an agent (*McClaghry v. Hancock County*, 46 Ill. 356), and by the above statute the board is required to direct the county clerk to procure the assessors' books. The only question here is whether authority was given, and the propositions of plaintiffs which were refused stated the correct rule of law that the county would be estopped to deny such authority by a course of dealing with plaintiffs for a term of years, during which it recognized the county clerk as its agent by adopting and ratifying all his purchases and paying for the supplies as purchased. The position assumed by defendant and represented by the propositions held by the court is indefensible in the law. The rulings on the propositions were wrong.

The judgments of the Appellate Court and Circuit Court are reversed, and the cause is remanded to the Circuit Court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

WORMSTEAD v. CITY OF LYNN

184 Mass. 425. 1903

CONTRACT against the city of Lynn, for alleged breach of contract, with one count for loss of profits, and another for expenses incurred.

At the trial in the Superior Court, WAIT, J. ruled that the plaintiff was not entitled to recover, and ordered a verdict for the defendant. He reported the case for determination by this court. If the city of

Lynn could be bound by a custom or practice of the superintendent of streets to make contracts for the city in excess of the authority conferred upon him by statute and by the ordinances of the city, there was to be a new trial; otherwise the verdict was to stand.

J. A. O'Keefe, for the plaintiff.

S. Parsons and H. S. Bowen, for the defendant.

LORING, J. This is an action for damages for breach of a contract in which the plaintiff's claim was that the defendant city agreed to pay him for riprapping an embankment as part of the work necessary to carry into effect an order for widening a public way within the city limits. The breach relied on was a refusal on the part of the defendant to allow the plaintiff to do any work at all under the alleged contract. The defense set up was that it never entered into any contract with the plaintiff.

Where a public way is widened by the public authorities, it becomes the duty of the city or town in which it is situated to perform the work of construction. But the order for widening does not without more enable the surveyor of highways or any officer of the city or town (as the case may be) to perform the work on behalf of the municipality in question, or to enter into a contract on its behalf to have it performed. The city or town must by vote contract for the work or authorize someone else to do so in its behalf. *Bean v. Hyde Park*, 143 Mass. 245.

It is not pretended that any such vote was passed by the city of Lynn in the case at bar. The plaintiff however relies on this: He proved that one Tarbox, who was superintendent of streets of the defendant city and who as such had the duties and powers of a surveyor of highways, made with the plaintiff by word of mouth the contract sued on, with the approval, but not by vote, of the mayor and one member of the committee of the board of aldermen on streets. The committee on streets consisted of the mayor and two aldermen. The plaintiff also proved that the city engineer came to the location of the work and gave him the lines to be followed. He then offered to prove by Tarbox (the present superintendent of streets of the defendant city), by one Bates (a former superintendent of streets of the defendant), by one Ramsdell (a former mayor), and one Sampson (a former alderman of the city), "that the superintendent of streets for the city of Lynn for the past eleven years had been in the habit of letting contracts for amounts in excess of \$10.00 for blasting and other similar work without authority from the committee on streets or the city council." The plaintiff also "offered to prove, if competent, that he had previously had a contract amounting to more than \$10.00 with the city of Lynn to widen a portion of Walnut Street in said Lynn, and that he had completed said contract and received his pay." The plaintiff's contention is that a city or town, by a practice or custom adopted by it, may authorize one of its officers to make contracts in its behalf, or at any rate that it may by such a practice or

custom hold him out as having such authority, and be estopped to deny that he had such authority in case a person acts on the faith of such holding out; and he relies on what was said in *Blanchard v. Ayer*, 148 Mass. 174, 178, in support of this contention. . . .

The plaintiff misapprehends what was meant by W. Allen, J., in *Blanchard v. Ayer*, 148 Mass. 174, 178, when he said that a town may authorize the surveyors to make contracts not within the statute "by express vote, or by a practice and custom adopted by the town." What was meant by "a practice and custom adopted by the town" is explained by what is said in the next paragraph of the opinion beginning with the words "If, for instance," and putting a case where a town by vote adopts a rule "that all bills for labor and materials in repairing the ways should be paid by the town treasurer, on the order of a highway surveyor approved by the selectmen, there can be no doubt that a person performing labor at the request of a surveyor, and having the proper order upon the treasurer for payment therefor, would have a right of action against the town. Authority by the town to make the contract for labor would be implied." X

In the case at bar there was no evidence of authority given by practice or custom impliedly adopted by a vote of the city government of Lynn. J

The other contention of the plaintiff is that the defendant city has held out the superintendent of streets as one having authority to contract, and is estopped to deny that authority as against the plaintiff who has acted on the faith of the practice which the city has allowed.

We do not stop to point out that the plaintiff's offer of proof might well be taken to be confined to letting contracts for the repair, and not to extend to a contract for the construction of public ways. For the decisive answer to the whole contention is that the doctrine relied on by him has no application where a person enters into a contract with a public officer who undertakes to act for and to bind a municipal corporation or other body politic. Such a person is bound at his peril to ascertain the extent of the authority of the public officer with whom he deals. In such a case the money pledged for the payment of the contractor is the money of the public or of an ascertained portion of the public, and the public is not estopped by a violation of duty on the part of public officials, no matter how many officials may have been concerned in it, and no matter how long it may have continued. See in this connection *Abbott v. North Andover*, 145 Mass. 484, 486. To bind the public the body must act which by law can bind them. The rule has been enforced in cases where parties have undertaken to make out a ratification by use of a public structure constructed without authority. In *Keyes v. Westford*, 17 Pick. 273, a better road was built than was provided in the lay-out by the county commissioners under a vote of the town authorizing the construction of the road as laid out. It was argued that as "the town have the benefit of it," it was bound

to pay for the better road. See page 279. It was held that the fact that the town never had voted for the better road was decisive of that argument. In the subsequent case of *Hayward v. North Bridgewater School District*, 2 Cush. 419, the fact that a school was kept in a schoolhouse built without authority, and that this was done by vote of the prudential committee of the school district, did not make the district liable because that committee had no authority to contract for the erection of a schoolhouse for the district. To the same effect see *Boston Electric Co. v. Cambridge*, 163 Mass. 64; and see *Delafield v. State*, 2 Hill (N. Y.), 159; *Marsh v. Fulton County*, 10 Wall. 676.

The entry must be

Judgment on the verdict.

ZOTTMAN v. THE CITY AND COUNTY OF

SAN FRANCISCO †

20 Cal. 97. 1862

FIELD, C. J. In May, 1854, the city of San Francisco, then a municipal corporation, entered into a contract with Nutting and Zottman for the improvement of certain public grounds of the city, known as Portsmouth Square, in accordance with certain plans and specifications, the work to be performed by the contractors under the supervision of a superintendent to be selected by the common council of the city, and to be completed to the satisfaction of a special committee to be appointed by the common council, by the 12th of September, following. A portion of the work designated in the contract consisted in the construction of an iron fence around the square. The contract was made in pursuance of an ordinance of the city, and no question is raised as to its validity. After it was made, the special committee and the superintendent appointed by the common council, upon examination of the plans and specifications, came to the conclusion, that to render the work more durable than originally intended, there ought to be a stone base to the fence, instead of the one of wood named in the contract. They also discovered that no provision was made for painting the iron of the fence, without which, as stated by one of the witnesses, it would have immediately rusted from the damp weather of the season, and the fence have become of little value to the city, either for ornament or use. The superintendent and special committee, under these circumstances, in presence of the city attorney, the president of the board of aldermen, and of different members of the board, ordered the contractors to perform the extra work men-

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174 R. v. Nutting & Zottman

tioned, that is, to construct a stone base in the place of one of wood, and to paint the iron of the fence — and assured them that the city would pay them therefor. In conformity with this order the extra work was performed, the contractors furnishing the necessary materials. And the testimony in the case shows that during its progress all the members of the common council must have been aware of the order to the contractors, as the work was in full view from the windows of the council chambers, and was the subject of general conversation and approval by the members at their various sessions and elsewhere, and no opposition to it was ever expressed by any member. One of the witnesses produced by the plaintiff, states that the fence constructed was accepted by the city, and the amount of the original contract allowed; but the record immediately adds, that it was not shown that there was any action on the subject in either board of the common council. The statement is therefore to be regarded only as an inference of the witness from the separate approval of the individual members of the council, and not as establishing the fact of acceptance of the extra work by the corporation. If the original contract price was in truth allowed by the city, that circumstance by itself only shows a waiver of any objection to the work by reason of its deviation from the original specifications. It does not prove any acceptance or approval of the extra work as such. A separate bill for the extra work, including the materials furnished in its execution, was presented by the contractors to the special committee, but it does not appear from the record that the bill was ever presented to the common council, or was ever the subject of consideration by either board. It is for the amount of this bill that the present action is brought, Nutting having assigned his interest in the demand to his co-contractor, the plaintiff, and the liabilities of the city of San Francisco having been cast by the consolidation act upon the defendants. The court below gave judgment of nonsuit against the plaintiff, on the ground that there was no evidence of any ordinance of the common council of the city authorizing the extra work; and from this judgment the appeal is taken.

It is not pretended that the superintendent or special committee had any authority to enter into any contract on behalf of the city. Their powers were limited to the execution of the original contract, and did not embrace the making of a new or different one. But it is contended in substance: *First*, that as the employment of the contractors to perform the extra work, which included the furnishing of the necessary materials, was known to the individual members of the common council, and was approved by them, an adoption and ratification of the employment by the corporation are to be presumed. . . .

An examination of the clauses of the charter of the city then in force, with reference to improvements and to contracts for work, will show the untenable character of the first position. The charter was

the source of all the power which could be exercised on the subject. Looking to that instrument, we find that it vested in the common council the legislative power of the city, and clothed them with exclusive authority over improvements of the city property, and prescribed the mode in which the authority should be exercised. It empowered the council to pass "all proper and necessary laws," for such improvements (art. iii. § 13), and it required "every ordinance providing for any specific improvement" to be published after its passage by one board, and before its transmission to the other, with the ayes and noes, in some city paper (art. iii. § 4), and it declared that "all contracts for work" should be let to the lowest bidder, after notice given through the public journals. (Art vi. § 7.) These provisions whilst conferring authority upon the common council, also fixed the bounds of their action. Beyond them they could not go and give validity to their acts. They could, therefore, only provide for any specific improvement of the city property by the passage of a law, that is, an ordinance for that purpose. "Laws" and "ordinances" when applied to the acts of municipal corporations are synonymous terms, and were so used in the charter. (Art. iii. § 3.) And to apprise the public of the improvement contemplated, and thus give an opportunity to suggest objections to the same, and to prevent improvident legislation on the subject, the clause was inserted in the charter requiring the publication of the ordinance for the improvement, after its passage by one board before its consideration by the other board. And even when the ordinance had become a law, to prevent favoritism or fraud on the part of the common council or the officers of the city, the provision was added for giving the contract to the lowest bidder after due notice in the public journals. A contract made in disregard of these stringent but wise provisions cannot be the ground of any claim against the city. Individual members of the common council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject, had the same and no greater validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct impart validity to such contract. But we go further than this; the common council even could not by any subsequent action give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. The rule is general and applies to the corporate authorities of all municipal bodies; where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the

power. Thus, where authority is conferred to sell property, with a clause that the sale shall be made at public auction, the mode prescribed is essential to the validity of the sale; indeed there is no power to sell in any other way. Aside from the mode designated there is a want of all power on the subject. This is too obvious to require argument, and so are all the adjudications. Thus in *Head v. The Providence Insurance Company*, 2 Cranch, 156, Mr. Chief Justice Marshall in speaking of bodies which have only a legal existence, says: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe the mode or the instrument no more creates a contract than if the body had never been incorporated." See *McCracken v. The City of San Francisco*, 16 Cal. 619; *The Farmers' Loan and Trust Co. v. Carroll*, 5 Barb. 649; *The New York Fire Insurance Co. v. Ely*, 5 Conn. 568; 13 Am. Dec. 100.

As a necessary consequence flowing from these views, a contract not made in the prescribed mode cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened upon the corporation. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; and a power to ratify in a given mode supposes the power to contract in the same way. Therefore, where the charter of a city authorizes a sale of city property only at public auction, a sale not thus made is from its very nature incapable of ratification, because it could not have been otherwise made originally. So where the charter authorizes a contract for work to be given only to the lowest bidder, after notice of the contemplated work in the public journals, a contract made in any other way — that is, given to any other person than such lowest bidder — cannot be subsequently affirmed. Were this not so, the corporate authorities would be able to do retroactively what they are prohibited from doing originally. We had occasion, in the case of *McCracken v. The City of San Francisco*, to give to this subject great consideration, and we there held, that where authority to do a particular act can only be exercised in a particular form or mode, the ratification must follow such form or mode, and that a ratification can only be made when the principal possesses at the time the power to do the act ratified. The doctrines there laid down we regard of vital importance for the protection of the interests of municipal corporations, and without an adherence to them, restrictions such as were embodied in the charter of San Francisco — or at present are embodied in the consolidation act — upon the corporate authorities, may be practically disregarded and defeated. Since that decision was rendered, we have had our attention called to the case of *Brady v. The*

Mayor, etc., of New York, 16 How. Pr. 432, where these doctrines are affirmed in an opinion of great force, and applied to an alleged contract for work done upon a street in the city of New York. [The court, after reviewing and quoting from the last cited decision, proceeded to hold, secondly, that the defendant was not liable for the value of the work and materials furnished, as upon a *quantum meruit*.¹]

[COPE, J. delivered a concurring opinion, retracting the doctrine laid down by him in *Argenti v. San Francisco*, 16 Cal. 255.]

Judgment affirmed.

3. *Ultra Vires and Irregular Contracts*

WORDEN, J., IN DRIFTWOOD VALLEY TURNPIKE COMPANY v. COMMISSIONERS OF BARTHOLOMEW COUNTY

72 Ind. 226, at 234. 1880

BUT the appellant insists that, as the appellee has received the full benefit of the contract, the latter is estopped to set up that it was *ultra vires*, and refers to the case of *The State Board of Agriculture v. The Citizens Street Railway Company*, 47 Ind. 407. That, however, was the case of a private corporation, the street railway company, that sought to avoid its obligation on the ground of want of power to make the contract. There is a broad difference between a private corporation organized for a private purpose, though subserving a public interest, and a public corporation, like a county or city, organized for public purposes only, and whose obligations must be paid from public funds raised for public purposes only. The latter class of corporations may always defend, on the ground that the supposed contract was outside of the authority conferred on it by law. In 1 *Dill., Mun. Corp.*, § 381, the author, after stating the general doctrine that the officers of a municipal corporation cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, says: "It results from this doctrine that unauthorized contracts are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up as a defense its own want of power under its charter or constituent statute to enter into the contract." *See* 791 *and* *under* *cases*

¹ See *McDonald v. Mayor*, *infra*.

BURRILL v. CITY OF BOSTON

2 Clifford (U. S. Dist. Ct.) 590. 1867

THIS was an action of *assumpsit* upon the following contract, made between the plaintiff and F. W. Lincoln, Jr., as mayor of the city of Boston:

"In consideration that Charles Burrill, of Brookline, Mass., shall obtain credits upon the quota of the city of Boston, I hereby agree to pay to the said Charles Burrill the sum of one hundred and twenty-five dollars per man, for each and every full man so credited upon said quota, the money to be paid to the said Burrill whenever he presents to me the official certificate from the proper authority, showing that such credits have been given.

"F. W. LINCOLN, JR., *Mayor*.

"May 31, 1864."

The credits referred to were for such residents of the city of Boston as had enlisted into the service of the United States during the late Rebellion, but had not been enrolled and credited to the quota of the city prior to February 24, 1864. The plaintiff was to obtain these credits under the provision of § 8, of the Act of July 4, 1864. Plaintiff claimed to have obtained credits for six thousand five hundred and twenty-nine men.

At the close of the plaintiff's case, the defendants moved the court for instructions that the plaintiff had not made out his case, and was not entitled to maintain his action.

B. F. Butler, Henry W. Paine, Benjamin Deane, William Gaston, for plaintiff.

B. R. Curtis, J. G. Abbott, J. P. Healey, for defendants.

CLIFFORD, J. . . . It is obvious that the mayor could not make such a contract in behalf of the city without the assent of the city council; and it is equally clear that the assent of the city council, if given, would be without any legal efficacy, unless the corporation possessed the power to contract such a pecuniary obligation. The great question, therefore, is the question of power, and it is the one first to be considered, because if it be determined against the plaintiff it is unnecessary to inquire whether the mayor did or did not act by the assent of the city council. The argument for the plaintiff is that the city council, even if they did not previously assent to the contract, subsequently ratified the act of the mayor in executing it; but, if the corporation possessed no power to incur such a pecuniary obligation, the city council could not effectually ratify it. [The court held that, without an express statutory grant of authority to do so, towns cannot raise money for military purposes, and that the statutes of the State which authorized towns to raise money to procure their quotas of volunteers in the War of the Rebellion, did not empower them to pay for

obtaining credits upon their quotas for residents previously enlisted and not credited.]

Our conclusion is that the defendants had no power to make the contract mentioned in the declaration; that they possess no power to assess and collect taxes for any such purpose, and consequently that the plaintiff cannot recover upon the special counts. Suppose that to be so, still, it is insisted by the plaintiff that he is entitled to recover a reasonable compensation for his labor and expenses under the common counts. Every suggestion upon that subject was listened to with attention, and has been carefully considered. Willing to be convinced, it was the purpose of the court to invite discussion upon the point, that no argument in support of the proposition might be overlooked. Some of the arguments are very ingenious, but they have failed to convince. Want of power to assess and collect the money to discharge the obligation, is the obstacle in the way of maintaining the suit on the express contract, and the same difficulty stands in the way of an action founded on an implied promise. Indebitatus assumpsit is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfil that obligation. Such a promise is always charged in the declaration, and must be so charged in order that the action may be maintained. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. *Curtis's Adm'rs. v. Fiedler*, 2 Black, 478; *Cary v. Curtis*, 3 How. 236. *Assumpsit* may be maintained against a municipal corporation in certain cases upon an implied promise, but the better opinion is that a promise to pay can never be implied in a case where the corporation possesses no power to contract. Unable to perceive that the plaintiff can recover in any view of the case, it becomes the duty of the court to give the instruction as prayed by the defendants. Verdict must be for the defendants, and the form of the verdict will be prepared accordingly.

DILL *et als.* v. INHABITANTS OF WAREHAM *

7 Metcalf (Mass.) 438. 1844

ASSUMPSIT upon a written agreement dated July 27, 1837, with a general *indebitatus* count for money had and received.

In the written contract the town appeared to grant to the plaintiffs all the right of the town to take oysters from certain rivers and coves, for a term of five years, with certain reservations. In consideration

thereof, the plaintiffs agreed to pay to the town twelve and one-half cents for every bushel of oysters taken, and to make and keep a deposit of \$500 in the hands of the town treasurer to secure payment.

The breach assigned was that the town, after for a time performing its part of the agreement, wrongfully refused to grant permits to the plaintiffs (which were necessary under the statutes), forbade them to take the oysters, and permitted others to take them; "whereby the plaintiffs have been put to great expense for vessels and men employed for the purpose, and have lost the profits secured to them by said agreement," etc. Plea, general issue, with a specification of defense.

At the trial, the contract was shown to have been regularly authorized by votes of the town, the deposit was shown to have been made, and there was evidence of the breach assigned. The defendant requested the court to instruct the jury that the town had no authority to make the contract, and that the evidence would not support a verdict for the \$500 paid. The court refused these requests, and instructed the jury that the contract was valid.

A verdict was returned for the plaintiffs for \$4560.42, which was to be set aside, and a new trial granted, if the foregoing rulings and instructions were erroneous; otherwise, judgment to be rendered upon the verdict.

J. P. Rogers and Washburn, for defendants.

Simmons and Gardiner, for plaintiffs.

SHAW, C. J. [After reviewing colonial and state legislation.] . . . Such a transfer of the fishery, and the power of making contracts respecting it, is not within the jurisdiction of towns, nor one of the corporate powers conferred on them by law. The supposed contract, therefore, upon which this action is brought, was one which the town of Wareham had no authority, as a corporation, to make, and the town is not bound by it.

In regard to the sum of \$500, as it appears that it was received by the treasurer and went to the use of the town, and was so received in advance, upon a consideration which has failed, it must be regarded as money had and received by the town to the plaintiff's use; and therefore the action for that sum will lie. No special demand was necessary. Where there is a debt, a duty to pay money presently, not dependent upon any condition or contingency, an action may be brought to recover it, without a previous demand. . . .

With the plaintiff's consent, the verdict may be amended, to stand as a verdict for \$500, with interest from the date of the writ, and judgment may be entered upon it; otherwise, the verdict is to be set aside and a new trial granted.¹

¹ "It is said that an action for money had and received may be maintained against a municipal corporation, when the money has been received under such circumstances that, independently of express contract, the obligation of repayment is imposed as a matter of right and justice. Thus, when it is received under a contract made without authority or in violation of law, the duty arises to refund the money to the party

TURNER *et al.* v. CRUZEN *et al.**

70 Iowa, 202. 1886

ACTION by taxpayers of Adams County to cancel a contract made by the county for the purchase of a farm from defendant Cruzen for a poor-farm, and to restrain defendant Hunter as county treasurer from paying warrants issued for the purchase money. The supervisors of the county are also joined as defendants. The plaintiffs allege that the purchase was *ultra vires* because not authorized by a vote of the people.

The answer, filed by Cruzen alone, shows that he has conveyed the property to the county, and that the latter has been occupying the same for a poor-farm for two years, and has never offered to reconvey the property nor to pay for the use of it. He avers that in any event the county should be made a party defendant.

On demurrer to the answer, the Circuit Court granted a decree for the relief prayed for, and the defendants appealed.

F. M. Davis and *S. McPherson*, for appellants.

T. M. Stuart and *W. O. Mitchell*, for appellees.

ADAMS, C. J. . . . The legal title to the property having been placed in the county, we are unable to see how the county could be divested by

from whom it was received, if, without affirming the illegal contract, the latter seeks only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. *Morville v. American Tract Society*, 123 Mass. 129. *Dill v. Wareham*, 7 Met. 438. *White v. Franklin Bank*, 22 Pick. 181. See also *Thomas v. Richmond*, 12 Wall. 349, 355. But in such cases it must appear that the money was actually and beneficially appropriated by the town or city in its corporate capacity. It cannot be treated as appropriated, merely because it has been applied by the unauthorized act of the town treasurer, or of any other person, to the payment of municipal debts, for the payment of which other provision had been made." *Colt, J., in Agawam National Bank v. So. Hadley*, 128 Mass. 503, at 508.

"The moneys paid by the bidders went into the treasury of the city, and were afterward by different ordinances and resolutions appropriated to municipal purposes. To the different actions, as we have mentioned, various defenses have been interposed. In some of them, as already stated, the entire transactions giving rise to or connected with the alleged sale have been treated as transactions to which the city was an absolute stranger; in other words, a want of privity, as it is termed, between the bidders and the city has been alleged. This alleged want of privity, as we understand it, amounts to this: that inasmuch as the mayor and land committee had no authority to make the sale, they had no authority to pay the money which they received from the bidders into the treasury of the city, and therefore no obligation can be fastened from such unauthorized act upon the city. The position thus restricted in its statement is undoubtedly correct, but the facts of the cases go beyond this statement. They show an appropriation of the proceeds, and the liability of the city arises from the use of the moneys, or her refusal to refund them after their receipt. The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or if used, to render an equivalent therefor, from the like obligation. (*Argenti v. San Francisco*, 16 Cal. 282.) The legal liability springs from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice." *Field, C. J., in Pimental v. San Francisco*, 21 Cal. 352, at 362. See also the language of the same judge in *Argenti v. San Francisco*, 16 Cal. 256, at 283; *McCracken v. San Francisco*, 16 Cal. 591.

a decree to which it is not a party. It may be that the county has no desire to rescind, and could, in fact, show that its contract of purchase was not *ultra vires*. Without question, the county has a right to be heard before its title can be disturbed. Possibly the court below did not intend to disturb the title. The language of the decree is "that the contract between the defendant Cruzen and the board of supervisors of Adams County, for a poor-farm, is absolutely null and void." It may be that the intention in decreeing the invalidity of the contract was merely to afford a basis for enjoining the payment of warrants issued for a part of the purchase money. If this is so, then the court proceeded upon the theory that the county could be relieved of a part of the burden of its contract while retaining the entire benefit of it. Of such decree the county could not, of course, complain. But such a decree cannot, in our opinion, be sustained.

It appears to us to be well settled as a rule, with one exception, that, where the consideration received by a corporation under an *ultra vires* contract can be restored, a court of equity will not relieve the corporation, as against the contract, without providing for a restoration of the consideration. *Pratt v. Short*, 53 How. Pr. 506; *Leonard v. City of Canton*, 35 Miss. 189; *Argenti v. San Francisco*, 16 Cal. 255 (282); *Moore v. Mayor, etc., of New York*, 73 N. Y. 238; *Lucas v. Co. Hunt*, Ohio St. 488.

It is no sufficient answer to say that Cruzen might still have his action against the county for reconveyance of the title. His right to a reconveyance should be decreed to him at the same time that the county is relieved from payment. There is nothing in the decree now which would estop the county from contesting the right of Cruzen to a reconveyance, because the county is not a party to this decree. Nor is it a sufficient answer to say that Cruzen has already received a large part of the purchase money, and that no judgment is rendered against him for it, and that none is asked. If a court of equity could deprive him of a part of the purchase money without decreeing a reconveyance of the farm, it might have deprived him of the whole, if the farm had been sold wholly on credit, and no payment had yet been made. The principle involved would be the same. We are aware that there is a class of cases where courts of equity declare a contract *ultra vires*, and grant relief in favor of a corporation, without any decree for the restoration of the consideration received by the corporation. This is so where municipal bonds have been issued in excess of the constitutional limit of indebtedness, and the money obtained thereon has been expended. Courts of equity decree the cancellation of such bonds, or enjoin payment, without decreeing repayment to the bondholders of the money received by the corporation on the bonds. But this results from the necessity of the case. If the courts should decree repayment, the very object of the constitutional provision would be defeated. . . .

Reversed.

CITY OF VALPARAISO v. VALPARAISO CITY WATER
COMPANY *

30 Ind. App. 316. 1903

APPEAL from Circuit Court, Lake County. Action by the water company against the city. The complaint shows that in 1885, the plaintiff's assignors accepted an ordinance which granted exclusive authority to construct a system of water-works and use the streets, to supply the city and inhabitants with water for fifty years. The ordinance fixed the rental per hydrant of the hydrants specifically provided for, and required that the grantees construct and maintain "additional hydrants," whenever directed by the city council, at a rental of \$50 per year each. The city reserved the right to purchase the system at any time after fifteen years, and a forfeiture in case of breach by the grantees was provided for. The plaintiff sues to recover \$25 per hydrant for the rental or use of certain additional hydrants from January 1 to July 1, 1910, which hydrants had been directed, accepted, and used by the city. The complaint alleges further that the amount stated is the reasonable value of the use of the hydrants for that period. A demurrer was overruled.

A. D. Bartholomew, H. A. Gillett, and H. H. Loring, for appellant.

N. L. Agnew, for appellee.

BLACK, J. . . . By way of objections to the complaint it is suggested that the contract provided for a monopoly by granting the exclusive use of the streets and the exclusive right to furnish the city and its inhabitants with water for a period of fifty years upon the conditions expressed in the ordinance; that hence the city exceeded its powers by agreeing to forego and postpone the exercise of legislative and discretionary powers, and therefore the contract is void; also the contract to pay a fixed and determinate sum for hydrant rental for so long a period was against public policy, and void. . . . But we think the objections thus urged against the contract are not properly involved in this action, and that the decision of the cause does not require a determination as to the extent of the authority of the city in this exercise of its business powers in the making of a contract for the construction and maintenance of water-works, either with reference to the period of the franchise or with reference to the exclusiveness of the grant. No question is made as to the authority of the city to make a contract with the assignors of the appellee for the construction and maintenance by them or their successors or assigns of a system of water-works for the city, and to provide therein for the payment of rentals by the city for the use of fire hydrants constructed and maintained under such contract. The furnishing of the use of the hydrants, the promised compensation for which it is here sought to recover, was the performance by the water-works company of

a wholly lawful consideration. If, in addition to its promise to pay for such use the reasonable value thereof, the city made other stipulations or promises beyond its authority, which could not be enforced against it because against public policy or unlawful, this would be no sufficient reason for its refusal to perform such lawful promise, based upon a wholly lawful consideration. The particular promise violated by the appellant was the promise to pay the hydrant rental after the use, and the action is to recover the value of the use as promised after the hydrants had been actually provided and used, the stipulated time for payment being past. The promise to pay for this use already enjoyed by the city may be enforced without sustaining any unauthorized or unlawful promise of the city. It cannot be supposed that the rental for the use of the additional hydrants was affected, as to the amount thereof, to the detriment of the city, by the provisions of the contract thus questioned. . . . In *Hitchcock v. Galveston*, 96 U. S. 341, the city, having power to make a valid contract to pave its streets, made such a contract, wherein it agreed to make payment for the work in certain bonds. It was contended that, since no express power was given to issue bonds for such purpose, the whole contract was inoperative and void. The Supreme Court of the United States, per Mr. Justice Strong, said that, if the city had no lawful authority to issue the bonds, it did not follow that the contract was wholly illegal and void, or that the plaintiff had no right under it. "They are not suing upon the bonds, and it is not necessary to their success that they should assert the validity of those instruments. It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work as well as to assume liabilities; that the city has received, and now enjoys, the benefit of what they have done and furnished; that for these things the city promised to pay; and that, after having received the benefit of the contract, the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. . . . The contract between the parties is in force so far as it is lawful. . . . Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return in the mode in which it promised to perform. This was directly ruled in *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702." In *Nebraska City v. Gas Co.*, 9 Neb. 339, an action brought by the gas company against the city to recover the contract price for gas furnished under a contract to the city for a certain month, it having been urged as against any recovery under the contract that it contained certain illegal provisions respecting the exemption of property from taxation, and the payment of money out of the sinking fund of the city, devoted by law to another purpose, it was said by the court that, admitting that in these particulars the city authorities exceeded their powers (which, however, was not decided),

that would be no defense to the action; that under the charter they were authorized to contract for lighting the streets with gas, and to bind the city for the price agreed upon; and that, so long as the city voluntarily received gaslight under the provisions of the contract, it could not resist payment of the agreed price simply because of these alleged illegal promises as to the particular fund from which the money should be drawn. "The consideration for these promises being entirely legal, and the price agreed upon being payable, if not otherwise, out of the general fund, these objectionable provisions may, if necessary, be rejected, and the rest of the contract permitted to stand; especially where, as here, the city has received the consideration for which the promises were made. *Chitty, Cont.*, § 674. If the company were resisting a tax levied in violation of this agreement, or if they were endeavoring to compel payment of a gas bill out of the sinking fund, the argument of counsel for the city in this behalf would be entitled to great weight, but under the issues in this case we deem it altogether inapplicable." . . . In *City of Brenham v. Brenham Water Co.* (Tex. Sup.), 4 S. W. 143, the action was brought to recover the stipulated price for the use of hydrants from June 1, 1885, to January 1, 1886. After construing the contract as intended by the parties to confer on the water company the exclusive right to furnish all the water the city and its inhabitants might need to have furnished through a system of water-works for the full period of twenty-five years, and to be paid therefor; and after holding that the city did not possess power, to confer such rights, the court was of the opinion that the contract, by its terms, precluded the city from the proper exercise from time to time of its legislative power, and that it was unconstitutional, because it created a monopoly; and that, therefore, it was invalid. Yet it was held that, if the company furnished water between the time the works were put in operation under the ordinance passed June 1, 1885, and the 10th of July of that year, when the city declined further to regard the contract as binding, for that the city ought to be held liable. We do not mean to be taken as approving all the opinion of the court in this Texas case, and we refer to it as an instance where a court of high reputation, upon such a contract, approved the recovery of the stipulated price for actual use and benefit under the contract. *Illinois Trust & Sav. Bank v. City of Arkansas City*, 76 Fed. 271, 22 C. C. A. 171, involved the question as to the right to recover from the city rentals for hydrants used under a contract in which the city assumed to grant the exclusive use of its streets to a private corporation. It was held, notwithstanding the exclusiveness of the grant that, after the contract had been substantially performed by the grantee, after the water-works had been constructed according to the terms of the contract, and after the city had accepted and used them for years, and had thus secured the substantial benefits of its grant, it could not repudiate all the obligations it had the power to assume, because it assumed one that was beyond its power. It was further said: "No one who

does not infringe or threaten to infringe the exclusiveness of the grant in a contract made by a municipality can, after the substantial performance of the contract by the grantee, be heard to say that the contract or grant is void on account of the exclusive character of the latter." In *Maher v. City of Chicago*, 38 Ill. 286, it was said: "If a municipal corporation, in dealing with individuals, assumes that it possesses certain corporate powers, upon which the validity of its acts depends, and it turns out that it does not possess the specific powers relied on, it is not thereby excused from the performance of its obligations, if they can be performed through the agency of other powers that it does possess." In *Dodge v. City of Council Bluffs*, 57 Ia. 560, the court upheld the action of the trial court in sustaining a demurrer to a petition of taxpayers to restrain action, pursuant to a contract for the construction of water-works, the accepted ordinance purporting to confer on the American Construction Company exclusive privileges. The court (page 566) said: "The ordinance purports to grant an exclusive right. Whether it is competent for the city to grant such a right we need not determine. If we should conclude that it was not, it is manifest that the ordinance would not be void. It would result merely that the right granted is not exclusive, and the plaintiffs, as mere taxpayers, cannot properly raise that question. Such question cannot properly be raised until a conflict arises between the American Construction Company and some person or persons or corporation claiming also a right from the defendant city to construct and operate water-works. *Grant v. City of Davenport*, 36 Ia. 406." See also *Schipper v. City of Aurora*, 121 Ind. 154. . . .

Judgment affirmed.

McDONALD v. MAYOR, ETC., OF NEW YORK *

68 N. Y. 23. 1876

APPEAL from order of the General Term of the Supreme Court in the first judicial department reversing a judgment in favor of plaintiff entered upon a verdict, and granting a new trial. *Reversed.*

FOLGER, J. The plaintiff sues to recover from the city the value of materials furnished by him to certain officials, which were used in the repair of a public way. The amount he claims is over \$1,600 in the whole. The materials were furnished at different times, in parcels, each of which, except one, was less in value than \$250.

He does not aver, nor did he prove in terms, that a necessity for the purchase or use of the materials was certified to by the head of the department of public works, or that the expenditure therefor was authorized by the common council (Laws of 1857, vol. 1, p. 886, ch. 446,

§ 38); nor did he aver or prove in terms, that a contract for the purchase of the materials was entered into by the appropriate head of department, upon sealed bids or proposals, made in compliance with public notice advertised. (*Id.*)

*Prope object
+ proper*

The existence and stringency of these statutory provisions are recognized by plaintiff's counsel, but the force of them is sought to be avoided. It is urged, that the object of the expenditure was proper, as it is part of the defendants' corporate duty to keep public ways in repair; that the material was delivered to the superintendent of roads, an official of the defendant, charged with carrying that duty into practical effect; and that the plaintiff had reason to believe that the superintendent was acting within the line of his duties. The first two of these propositions may be admitted; the third may not be. Doubtless, to the apprehension of the plaintiff, the superintendent was so acting, as to do work which it was the duty of the defendant to cause to be done. But we see nothing in the case which brought to his mind, so as to create a belief, that there had been a contract made for the material, as above indicated, or that the necessity for the expenditure had been certified to and authorized, as required by law. And though the superintendent of roads had certified to be correct, the bills for the materials, rendered by the plaintiff, this did not meet the letter of the statute laws. Such certification did not precede the reception of the material; nor was the certification by the head of the department, nor was the taking and use of the material, nor payment for it, authorized by the common council. Nor can it be that the provisions of the statute, are alone for the instruction of the department and officials of the defendant. They were a restraint upon them, but upon other persons as well. They put upon all who would deal with the city, the need of first looking for the authority of the agent with whom they bargain. Quite clearly do they impose upon the paying agent of the defendant a prohibition against an unauthorized expenditure. And are they not also a restraint upon the municipality itself? They are fitted to insure official care and deliberation, and to hold the agents of the public to personal responsibility for expenditure; and they are a limit upon the powers of the corporation, inasmuch as they prescribe an exact mode for the exercise of the power of expenditure. . . .

But the main reliance of the plaintiff, is upon the proposition that the defendant, having appropriated the materials of the plaintiff and used them, is bound to deal justly and to pay him the value of them. The case of *Nelson v. The Mayor* (63 N. Y. 535), is cited. The learned judge who delivered the opinion in that case does, indeed, use language which approaches the plaintiff's proposition; but the judgment in that case did not go upon the doctrine there put forth; and when the opinion is scrutinized it does not quite cover this case. It is said: "If it (the city), obtains property under a void contract, and actually uses the property, and collects the value of it from property owners by means of

assessments, the plainest principles of justice require that it should make compensation, for the value of such property, to the person from whom it was obtained." The words we have marked in italics indicate a difference between the two propositions; though it is to be admitted, not a great difference in the principles upon which each rests. The case in the California courts (*Argenti v. San Francisco*, 16 Cal. 255), goes upon the ground set forth in the opinion in *Nelson's Case*, (*supra*). There is, however, a more radical difference, than that above noted, in the two cases cited and that in hand. In those two cases the way was open for implying a promise to pay what the property was worth, if with no disregard of statute law, such an implication was admissible; that is to say, there was in those cases, so far as appears from the facts, no express inhibition upon the city that it should not incur a liability save by an express contract. Here there is an express legislative inhibition upon the city, that it may not incur liability unless by writing and by record. How can it be said that a municipality is liable upon an implied promise, when the very statute which continues its corporate life, and gives it its powers, and prescribes the mode of the exercise of them, says, that it shall not, and hence cannot, become liable, save by express promise? Can a promise be implied, which the statute of frauds says must be in writing to be valid? How do the cases differ? *The Bank of the United States v. Dandridge* (*supra*) [12 Wheat. 64], which is a leading case upon the doctrine of the liability of a corporation aggregate, upon a promise implied, holds, as we have already said, that if the charter imposes restrictions upon the manner of contracting, they must be observed. And the California cases above cited concede the same. It is plain that if the restriction put upon municipalities by the legislature, for the purposes of reducing and limiting the incurring of debt and the expenditure of the public money, may be removed, upon the doctrine now contended for, there is no legislative remedy for the evils of municipal government, which of late have excited so much attention and painful foreboding. Restrictions and inhibition by statute are practically of no avail, if they can be brought to naught by the unauthorized action of every official of lowest degree, acquiesced in, or not repudiated, by his superiors. *Donovan v. The Mayor, etc.* (33 N. Y. 291), seems to be an authority in point, though the exact question now presented was not considered. And incidental remarks of Denio, J., in *Peterson v. The Mayor* (17 N. Y. 449), are to the same purport. And see *Peck v. Burr* (10 N. Y. 294). The views here set forth, are not to be extended beyond the facts of the case. It may be, that where a municipality has come into the possession of the money or the property of a person, without his voluntary intentional action concurring therein, the law will fix a liability and imply a promise to repay or return it. Thus, money paid by mistake, money collected for an illegal tax or assessment; property taken and used by an official, as that of the city, when not so; — in such cases, it may

be that the statute will not act as an inhibition. The statute may not be carried further than its intention, certainly not further than its letter. Its purpose is to forbid and prevent the making of contracts by unauthorized official agents, for supplies for the use of the corporation. This opinion goes no further than to hold, that where a person makes a contract with the city of New York for supplies to it, without the requirements of the charter being observed, he may not recover the value thereof upon an implied liability.

The judgment should be affirmed.

LONDON, ETC., LAND COMPANY v. CITY OF JELICO

103 *Tenn.* 320. 1899

CALDWELL, J. The London and New York Land Company brought this bill against the city of Jellico to recover a certain sum of money for grading one of defendant's streets, under a contract made for that purpose. The chancellor dismissed the bill, but the court of chancery appeals reversed his action, and pronounced a decree in favor of the complainant for \$476.86. The principal defense interposed by the city is rested upon the fact that the contract under which the grading was done was made at a special meeting of the board of mayor and aldermen, called without notice to some of the aldermen, and held in their absence. The result of the authorities upon the subject is that, as a general rule, every member of a municipal council is entitled to reasonable notice of special meetings, and that no important action can lawfully be taken at such meeting unless such notice has first been given, or unless the members not notified actually attend and participate in the business of the meeting. [Citations omitted.] The present contract was confessedly subject to this general rule, and, being so, it was undoubtedly invalid, and, nothing else appearing, the complainant would inevitably be repelled from court.

There is another aspect of the case, however, that demands the consideration of the court. The contract was fair and reasonable in its terms, and was within the scope of the powers conferred upon the council for the improvement of streets. It soon became known to the members of the council, who permitted it to go unrescinded and unchallenged, and allowed the complainant to continue the work through several months to completion, in the belief that all was satisfactory, and with the unquestionable result of large and permanent advantage to the municipality. Having thus received benefits for which the council might well have contracted in a proper meeting, the city will

not now be heard to deny liability therefor. In such a case, liability arises by implication of law, and payment must be made according to the benefits received. The law, which always intends justice, implies a promise. [Citations omitted.] Since the price named in the invalid contract is shown to be entirely fair and reasonable, not only in view of the labor done, but also in reference to the benefits conferred, it will be taken as the true measure of recovery. . . .

The decree of the Court of Chancery appeals is affirmed.¹

4. *Liability for Borrowed Money and on Commercial Paper*

TOWN OF HACKETTSTOWN v. SWACKHAMER

37 N. J. Law, 191. 1874

BEASLEY, C. J. The note, which is the subject of this suit, was given by the treasurer of the town of Hackettstown, in the name and behalf of the town, for money borrowed. This case, therefore, raises the question whether a municipal corporation, in the absence of an express power for that purpose, can contract for loans for the supply of its ordinary expenses.

At the present time it seems to be generally conceded that a private corporation, constituted with a view to pecuniary profit, has, by implication, when not in this particular specially restricted, the power in question. The law was so held in this State, in the case of *Lucas v. Pitney*, 3 Dutcher, 221, and the same rule has been repeatedly recognized in other decisions. And this result is the appropriate product of the principle that corporate powers which are the necessary accompaniments of powers conferred, will be implied. In these instances the ability to borrow money is so essential that without it the business authorized could not be conducted with reasonable efficiency, and, as it cannot be supposed that it was the legislative intent to leave the company in so imperfect a condition, the inference is properly drawn that the power to raise money in this mode is inherent in the very constitution of such corporate bodies. Such a deduction is simply, in effect, a conclusion that the lawmaker designed to authorize the use of the means fitted to accomplish the purpose in view. It has been often said that the means which can be thus raised up by implication must be necessary to the successful prosecution of the enterprise, and

¹ For an interesting decision upholding an action on a contract notwithstanding an irregularity in the passage of the ordinance under which it was made, see *Moore v. Mayor, etc., of New York*, 73 N. Y. 238.

that the circumstance that they are convenient will not legalize their introduction. But the necessity here spoken of does not denote absolute indispensableness, but that the power in question is so essential that its non-existence would render the privileges granted practically inoperative, or incomplete. It is, consequently, obvious that a presumption, resting on such a basis as this, must spring up in favor of almost the entire mass of commercial and manufacturing corporations, for without the franchise to effect loans, the chartered business could be but imperfectly transacted. And yet, even in such instances, the usual inference that such an implied power exists may be repelled by the language of the particular charter or the peculiar circumstances of the case. In a word, the rule of law in question is nothing but the discovery, by the courts, of the legislative intent, such intent having been ascertained by a construction of charters, as applied to the subject matters.

Taking this as the ground of our reasoning, I am at a loss to perceive how it can be inferred that a power to borrow money is an appendage to the usual franchises given to municipal corporations. Such a right cannot, in any reasonable sense, be said to be necessary within the meaning of that term as already defined. Under ordinary circumstances, it is not certainly indispensable as common experience demonstrates. In the great majority of instances the municipal affairs are, with ease and completeness, transacted without it. I do not wish to be understood as indicating that under certain special conditions an opposite deduction may not be legitimately drawn. It is plain that it is practicable to impose a duty on a municipality requiring the immediate use of large sums of money, and in such a situation the inference may become irresistible that it was intended that funds were to be provided by loans. My remarks are to be restricted to that class of cases where charters are granted containing nothing more than the usual franchises incident to municipal corporations, and under such conditions it seems clear to me that the power to borrow money is not to be deduced. I have already said that it does not appear to be a necessary incident to the powers granted, for such powers can be readily and efficiently executed in its absence. It would be to fly in the face of all experience to claim that the ordinary municipal operations cannot be efficiently carried on except with the assistance of borrowed capital. Without any help of this kind, it is well known that our towns and cities have long been, and are now being, improved and governed. For the attainment of these ends it has not generally been found necessary to resort to loans of money. The supplies derived annually from taxation have been found amply sufficient for these purposes. Consequently I am unable to perceive any necessity to borrow money, under these conditions, from which the gift of such power to borrow is to be implied. It undoubtedly is clear that if, as has been asserted, the ends of the municipal charter can be conveniently reached, without a resort to the device of raising moneys by loan, there is not the least legal basis for a claim

Posst-exception

of the power to obtain funds in that way. Granted the fact that the charter can be executed with reasonable ease and with completeness, the conclusion is inevitable that the power in question cannot be called into existence by intendment, and as I claim the fact to exist I must, of necessity, reject the right of implication in question.

Nor is there anything in the language or in the frame of the present charter which would seem to favor the idea of the existence of an authority in the corporation to borrow money. It is in the ordinary fashion, giving the usual prerogatives of administration, improvement, and police, and then follows the important clause, declaring "that it shall be lawful for the common council, from year to year, to vote and raise by tax such sum or sums of money as they shall deem necessary and proper." Of course there can be no doubt with respect to the purposes to which the money thus authorized to be levied is to be applied. It is the means whereby the duties of local government are to be discharged. There is no limitation on the amount that may be raised. But there is a limitation on the method of raising it. It is not a general authority to raise money in any mode which the common council shall devise. The restriction is, it shall be raised "by tax." How can it be claimed, then, that it can be raised by loan? The power to borrow money is, in a certain sense, a larger power than that of raising money by taxation. There is, in the nature of the thing, an immediate check to excessive taxation; that is, the resistance of the parties taxed. There is none such in the power to borrow, for the immediate burthen of a loan is but slightly felt. Indeed, it is difficult to imagine any greater power that one person can confer upon another than an unlimited authority to borrow money. It is a common thing for an agent to have the right to contract debts in the name of his principal; but a very uncommon thing for such agent to be authorized to borrow money *ad libitum*. A more dangerous confidence could scarcely be given. If the municipal authorities under one of these charters, which in these days are so common, have this power to borrow, which is claimed for them, such power is practically unlimited. I see no limit to it, except the good sense, virtue, and intelligence of the depositaries of it. It may be resorted to on all occasions in the management of the affairs of the city. The use of such a power might, at the will of the officials, be co-extensive with the corporate operations. All the usual enterprises and improvements could be undertaken on a basis of a credit; and annual taxation, instead of being made the basis and measure of annual expenditure, could readily be converted into a subordinate auxiliary to an extended system of loans. It is plain that such a power would be full of peril to the owners of city property, and the widest door would be thus thrown open to extravagance, recklessness, and fraud. In my judgment, if such a system was judicially recognized, and such recognition was promulgated, almost every city in the State would be soon overwhelmed with indebtedness. Nor do I for a moment believe that a municipality

could obtain from any legislature an unrestricted power to borrow money. It is probable that such a boon has never been solicited by any public corporation. Our statutory history evinces clearly that the power in question has been granted with a stinted hand and circumscribed by well defined limitations. My judgment is entirely averse to raising up this dangerous power by implication. If the rules of law compelled the court to make such implication, it seems to me such result would be largely injurious to the well-being of the State; and it is, therefore, a satisfaction to know such rules of law do not exist. The authority to tax affords a sufficient source of funds requisite for all municipal purposes, and the consequence is there can be no inference of the existence of the superfluous power to borrow money for the same end.

An examination of the books will show that this question has not as yet received much judicial consideration. The courts of Wisconsin and Ohio have had this matter before them, and have arrived at a result the opposite of that which has just been stated. I have carefully weighed the arguments of these learned tribunals, but they have failed to convince my understanding. The cases referred to are those of *Mills v. Gleason*, 11 Wis. 470; and *Bank v. Chillicothe*, 7 Ohio, part II, 31. As a counterpoise to these views stands the weighty opinion of Judge Dillon, in his treatise on *Municipal Corporations*, vol. 1, § 81. Much emphasis is added to this expression of opinion, from the fact that this author had before him, at the time he wrote, the opposing cases just cited. In this state of the authority, it cannot be claimed that the principle is so settled that the judgment of this court cannot be freely exercised with respect to this important subject. My conclusion is that already expressed, that a right to borrow money is not to be inferred from any of the ordinary powers conferred in the charters of municipal corporations, and that, under ordinary circumstances, such a power can proceed only from an express grant to that effect.

2 Nor do I think that it adds anything to the right, to enforce the note in this case, that the money which it represents and which was borrowed has been expended in behalf of the corporation for legitimate purposes. The argument on this head was that, as the money had gone for the benefit of the corporation, the law, upon general principles, would compel its re-payment. If this is so, then the rejection of an implied power to borrow is of little avail. The doctrine, although repudiated in the abstract, would be ratified in the concrete. If this contention is tenable, it is impossible to close the eye to the fact that the loan, although held illegal and void in its inception, would thus, by a subsequent act, be rendered valid and enforceable. To style it, as was done in the argument, money had and received, would not change the real nature of the transaction. To permit a recovery of it in this secondary form would be, virtually and in truth, to effectuate a loan, and all the evils attendant on the power to borrow money in an unrestricted form, would supervene. And it is to be noted, that it is altogether a fallacy to argue

that the law will raise an implied promise to repay the money after it has been used. The impediment to such a theory is, that the corporation has not the competency to make the promise thus sought to be implied. An express promise, to the effect contended for, would be illegal, and, therefore, clearly, the law will not create one by implication. It is not the case of a principal using money borrowed by his agent without authority, but it is the case of a principal who is incapacitated by law from borrowing, and who, therefore, cannot legalize the act, either directly or by circuit. Perhaps a parallel instance would be presented in case of a loan to a married woman at common law, the money being used by her. Her promise to repay the loan would be void; and, from the fact of her having made use of the money, no implied promise in law could be deduced.

The lender of such money may, perhaps, have his redress against the officer of the corporation, who unjustifiably held himself out as possessed of the right to take the loan in the name and on the responsibility of the city, or by a recourse to equity, asking to be subrogated to the rights of those creditors who have received his money, instead of having their debts paid by the corporation. But even if the holder of this note should be remediless, the result is the same. No one can justly reproach the law for not providing him a remedy for his own folly or indiscretion. Such folly or indiscretion may have enabled the city officials to create a burthen, or may have stimulated them to acts of extravagance which would not have been otherwise created or done. It is but just that the individual who has occasioned the evil should bear the loss. But whether the owner of this paper be remediless or not, it is enough for the present purpose to say that there is no apparent ground on which this money, thus illegally loaned, can be recovered by an action at law.

The establishment of these general principles necessarily leads to a decision against the plaintiff in this case. But there are narrower grounds which would conduct to the same result.

On the admission that the common council, which is the ruling power of the corporation, had authority to contract the debt in question, it was not shown at the trial, with anything like legal certainty, that this loan was either authorized or ratified by such body. The treasurer obtained the money and gave the note. The proof of his authorization consisted in his statement that he had a "verbal authority to borrow money needed for the purposes of the town." This is entirely too loose. Such a power could not be transferred, except by a formal resolution, passed at a legal meeting of the council, or by an ordinance duly enacted. Nor was it shown that the fact of the money's having been expended for town purposes, was ever known to the council. The result is that, at the trial, there was proof neither of the authorization of the treasurer, nor of ratification of his act. One of the essentials of the plaintiff's case was wanting to it. On this ground alone there must be a new trial.

Remedy

W. L. The further question was discussed at the bar, whether a municipal corporation, lacking a special authority to that end, can execute a promissory note. I have examined the subject, but the views already expressed render it unnecessary to pronounce any final conclusion with respect to it, for the purposes of the present case. I may say, however, that my present view is, that a corporate body of this character has the general and inherent right to execute a note as a voucher of indebtedness, but that such note will not have the effect, when in the hands of a *bona fide* holder before maturity, of cutting off the equities existing between the maker and payee. In this respect I fully concur in the learned opinion of Mr. Justice Bradley, recently read in the Supreme Court of the United States, in the case of *The Mayor v. Ray*, 19 Wall. 468.

Let a venire de novo be awarded.

LITCHFIELD v. BALLOU

114 U. S. 190. 1885

THIS was a bill in chancery to enforce payment of moneys loaned to a municipality in violation of law, and for which it had been held that an action could not be maintained at law. *Buchanan v. Litchfield*, 102 U. S. 278. The facts are stated in the opinion of the court.

John M. Palmer and B. S. Edwards, for appellant.

D. T. Littler, for appellees.

MILLER, J. This is an appeal from a decree in chancery of the Circuit Court for the Southern District of Illinois.

The suit was commenced by a bill brought by Ballou against the city of Litchfield. Complainant alleges that he is the owner of bonds issued by the city of Litchfield to a very considerable amount. That the money received by the city for the sale to him of these bonds was used in the construction of a system of water-works for the city, of which the city is now the owner. He alleges that one Buchanan, who was the owner of some of these bonds brought suit on them in the same court and was defeated in his action in the Circuit Court and in the Supreme Court of the United States, both of which courts held the bonds void.

2 He now alleges that, though the bonds are void, the city is liable to him for the money it received of him, and as by the use of that money the water-works were constructed, he prays for a decree against the city for the amount, and if it is not paid within a reasonable time to be fixed by the court, that the water-works of the city be sold to satisfy the decree. The bill also charges that he was misled to purchase the bonds by the false statements of the officers, agents and attorneys of the city, that the bonds were valid. Other parties came into the liti-

gation, and answers were filed. The answer of the city denies any false representations as to the character of the bonds, denies that all the money received for them went into the water-works, but part of it was used for other purposes, and avers that a larger part of the sum paid for the water-works came from other sources than the sale of these bonds, and it cannot now be ascertained how much of that money went into the works.

The case came to issue and some testimony was taken, the substance of which is that much the larger part of the money for which the bonds were sold was used to pay the contractors who built the water-works, while a very considerable proportion of the cost of these works was paid for out of taxation and other resources than the bonds.

There is no evidence of any false or fraudulent representations by the authorized agents of the city. 2'

The bonds were held void in the case of *Buchanan v. Litchfield*, 102 U. S. 278, because they were issued in violation of the following provision of the Constitution of Illinois:

"ARTICLE IX, SECTION 12. No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness."

It was made to appear as a fact in that case, that at the time the bonds were issued the city had a pre-existing indebtedness exceeding five per cent of the value of its taxable property, as ascertained by its last assessment for State and county taxes.

The bill in this case is based upon the fact that the *bonds are* for that reason void, and it makes the record of the proceedings in that suit an exhibit in this. But the complainant insists that, though the bonds are void, the city is bound, *ex æquo et bono*, to return the money it received for them. It therefore prays for a decree against the city for the amount of the money so received.

There are two objections to this proposition: 1. If the city is liable for this money, an action at law is the appropriate remedy. The action for money had and received to plaintiff's use is the usual and adequate remedy in such cases where the claim is well founded, and the judgment at law would be the exact equivalent of what is prayed for in this bill, namely, a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings.

In this view the present bill fails for want of equitable jurisdiction.

2. But there is no more reason for a recovery on the *implied* contract to repay the money, than on the express contract found in the bonds.

The language of the Constitution is that no city, etc., "shall be al-

lowed to become *indebted in any manner or for any purpose* to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property." It shall not *become indebted*; shall not incur any pecuniary liability. It shall not do this in *any manner*. Neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any *purpose*. No matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever.

If this prohibition is worth anything it is as effectual against the implied, as the express, promise, and is as binding in a court of chancery as a court of law.

Counsel for the appellee in their brief, recognizing the difficulty here pointed out, present their view of the case in the following language:

"The theory of relief assumed by the bill is, that notwithstanding the bonds were wholly invalid, and no suit at law could be successfully maintained either upon the bonds or upon any contract as such growing out of the bonds, yet as the city of Litchfield is in possession of the money received for the bonds, or, which is the same thing, its equivalent in property identified as having been procured with this money and having repudiated and disclaimed its liability in respect of the bonds, it must, upon well established equitable principles, restore to the complainants what it actually received, or at least, so much of what it received as is shown now to be in its possession and in its power to restore."

If such be the theory of the bill, the decree of the court is quite unwarranted by it. The money received by the city from Ballou has long passed out of its possession, and cannot be restored to complainant. Neither the specific money nor any other money is to be found in the safe of the city or anywhere else under its control. And the decree of the court, so far from attempting to restore the specific money, declares that there is due from the city of Litchfield to complainants a sum of money, not that original money, but a sum equal in amount to the bonds and interest on them from the day of their issue. Is this a decree to return the identical money or property received, or is it a decree to pay as on an implied contract the sum received with interest for its use?

As regards the water-works, into which it is said the money was transmuted; if the theory of counsel is correct, the water-works should have been delivered up to plaintiffs as representing their money, as property which they have purchased, and which, since the contract has been declared void, is *their property* as representing their money. In this view the restoration to complainants of the property which represents their money puts an end to obligations on both sides growing out of the transaction. The complainants, having recovered what was theirs,

have no further claim on the city. The latter having discharged its trust by returning what complainant has elected to claim as his own, is no longer liable for the money or any part of it.

But here also the decree departs from what is now asserted to be the principle of the bill. Having decreed an indebtedness where none can exist, and declared that complainant has a *lien* on, not the ownership of, the water-works, it directs a sale of the water-works for the payment of this debt and the satisfaction of this lien.

If this be a mode of pursuing and reclaiming specific property into which money has been transmuted, it is a new mode. If the theory of appellee's counsel be true, there is no *lien* on the property. There is no debt to be secured by a lien. That theory discards the idea of a debt, and pursues the money into the property, and seeks the property, not as the property of the city to be sold to pay a debt, but as the property of complainant, into which *his* money, not the city's, has been invested, for the reason that there was no debt created by the transaction.

The money received on the bonds having been expended, with other funds, raised by taxation, in erecting the water-works of the city, to impose the amount thereof as a lien upon these public works would be equally a violation of the constitutional prohibition, as to raise against the city an implied *assumpsit* for money had and received. The holders of the bonds and agents of the city are *participes criminis* in the act of violating that prohibition, and equity will no more raise a resulting trust in favor of the bondholders than the law will raise an implied *assumpsit* against a public policy so strongly declared.

But there is a reason why even this cannot be done.

Leaving out of view the question of tracing complainants' money into these works, it is very certain that there is other money besides theirs in the same property. The land on which these works are constructed was bought and paid for before the bonds were issued or voted. The streets through which the pipes are laid are public property into which no money of the complainants entered. Much, also, of the expense of construction was paid by taxation or other resources of the city. How much cannot be known with certainty, because, though the officers of the city testify that on the books a separate water-works account was kept, there is no evidence that the funds which went to build these works are traceable by those books to their source in any instance.

If the complainants are after the money they let the city have, they must clearly identify the money, or the fund, or other property which represents that money, in such a manner that it can be reclaimed and delivered without taking other property with it, or injuring other persons or interfering with others' rights.

It is the consciousness that this cannot be done which caused the court and counsel to resort to the idea of a debt and a lien which cannot be sustained. A lien of a person on his own property which is and has

always been his, in favor of himself, is a novelty which only the necessities of this case could suggest.

Another objection to this assertion of a right to the property is, that the bondholders, each of whom must hold a part of whatever equity there is to the property, are numerous and scattered, and the relative amount of the interest of each in this property could hardly be correctly ascertained. The property itself cannot be divided; its value consists in its unity as a system of water-works for the city. Without the land and the use of the streets, the value of the remainder of the plant is gone. In these, complainants can have no equity.

The decree of the court is reversed and the case remanded, with directions to dismiss the bill.

HARLAN, J., dissented.

TOWN OF COLOMA v. EAVES

92 U. S. 484. 1875

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Assumpsit brought by the plaintiff below to recover the amount due on the coupons attached to certain bonds, purporting to have been issued by the town of Coloma, through its proper officers, to the Chicago and Rock River Railroad Company, in payment of a subscription of \$50,000 by the town to said company. The form of the bond is as follows:

"UNITED STATES OF AMERICA (\$1,000.

"COUNTY OF WHITESIDE,

"*State of Illinois, Town of Coloma: --*

"Know all men by these presents, That the township of Coloma, in the County of Whiteside, and State of Illinois, acknowledges itself to owe and be indebted to the Chicago and Rock River Railroad Company, or bearer, in the sum of \$1,000, lawful money of the United States; which sum the said town of Coloma promises to pay to the Chicago and Rock River Railroad Company, or the bearer thereof, on the first day of July, 1881, at the office of the treasurer of the County of Whiteside aforesaid, in the State of Illinois, on the presentation of this bond, with interest thereon from the first day of January, 1872, at the rate of ten per centum per annum, payable annually at the office of the treasurer of the County of Whiteside aforesaid, on the presentation and surrender of the annexed coupons.

"(U. S. \$5 revenue-stamp.)

"This bond is issued under and by virtue of a law of the State of Illinois entitled 'An Act to incorporate the Chicago and Rock River Railroad Company,' approved March 24, 1869, and in accordance with a vote of the electors of said

township of Coloma, at a regular election held July 28, 1869, in accordance with said law, and under a law of the State of Illinois entitled 'An Act to fund and provide for the paying of the railroad debts of counties, townships, cities, and towns,' in force April 16, 1869; and, when this bond is registered in the State auditor's office of the State of Illinois, the principal and interest will be paid by the State treasurer, as provided by said last-mentioned law.

"In witness whereof, the supervisor and town-clerk of said town have hereunto set their hands and seals this first day of January, A. D. 1872.

"(Signed)

M. R. ADAMS, *Supervisor.*

(SEAL.)

"(Signed)

J. D. DAVIS, *Town-Clerk.*

(SEAL.)"

Recovery was resisted by the town, mainly upon the alleged ground of a want of power in the officers of the town to issue the bonds, because the legal voters of the town had not been notified to vote upon the question of the town's making the subscription in question.

On the trial of the case, judgment was rendered for the plaintiff for the amount of the coupons, and interest after they were due.

C. M. Osborn, for plaintiff.

J. Grant, contra.

STRONG, J. It appears by the record that the plaintiff is a *bona fide* holder and owner of the coupons upon which the suit is founded, having obtained them before they were due, and for a valuable consideration paid. The bonds to which the coupons were attached were given in payment of a subscription of \$50,000 to the capital stock of the Chicago and Rock River Railroad Company, for which the town received in return certificates of five hundred shares of \$100 each, in the stock of the company. That stock the town retains, but it resists the payment of the bonds, and of the coupons attached to them, alleging that they were issued without lawful authority.

Saying nothing at present of the dishonesty of such a defense while the consideration for which the bonds were given is retained, we come at once to the question, whether authority was shown for the stock subscription, and for the consequent issue of the bonds. At the outset, it is to be observed that the question is not between the town and its own agents; it is rather between the town and a person claiming through the action of its agents. The rights of the town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority.

By an act of the legislature of Illinois, the Chicago and Rock River Railroad Company was incorporated with power to build and operate a railroad from Rock Falls on Rock River to Chicago, a distance of about one hundred and thirty miles. The tenth section of the act enacted that, "to aid in the construction of said road, any incorporated city, town, or township, organized under the township organization laws of the State, along or near the route of said road, might subscribe to the capital stock of said company." That the town of Coloma was one of the municipal divisions empowered by this section to subscribe

fully appears, and also that the railroad was built into the town before the bonds were issued. But it is upon the eleventh section of the act that the defendant relies. That section is as follows:

"No such subscription shall be made until the question has been submitted to the legal voters of said city, town, or township, in which the subscription is proposed to be made. And the clerk of such city, town, or township, is hereby required, upon presentation of a petition signed by at least ten citizens who are legal voters and taxpayers in such city, town, or township, stating the amount proposed to be subscribed, to post up notices in three public places in each town or township; which notices shall be posted not less than thirty days prior to holding such election, notifying the legal voters of such town or township to meet at the usual places of holding elections in such town or township, for the purpose of voting for or against such subscriptions. If it shall appear that a majority of all the legal voters of such city, town, or township, voting at such election, have voted 'for subscription,' it shall be the duty of the president of the board of trustees, or other executive officer of such town, and of the supervisor in townships, to subscribe to the capital stock of said railroad company, in the name of such city, town, or township, the amount so voted to be subscribed, and to receive from such company the proper certificates therefor. He shall also execute to said company, in the name of such city, town, or township, bonds bearing interest at ten per cent per annum, which bonds shall run for a term of not more than twenty years, and the interest on the same shall be made payable annually; and which said bonds shall be signed by such president or supervisor or other executive officer, and be attested by the clerk of the city, town, or township, in whose name the bonds are issued."

Sect. 12 provides, "It shall be the duty of the clerk of any such city, town, or township, in which a vote shall be given in favor of subscriptions, within ten days thereafter, to transmit to the county-clerk of their counties a transcript or statement of the vote given, and the amount so voted to be subscribed, and the rate of interest to be paid."

Most of these provisions are merely directory. But conceding, as we do, that the authority to make the subscription was, by the eleventh section of the act, made dependent upon the result of the submission of the question, whether the town would subscribe, to a popular vote of the township, and upon the approval of the subscription by a majority of the legal voters of the town voting at the election, a preliminary inquiry must be, How is it to be ascertained whether the directions have been followed? whether there has been any popular vote, or whether a majority of the legal voters present at the election did, in fact, vote in favor of a subscription? Is the ascertainment of these things to be before the subscription is made, and before the bonds are issued? or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the

statute. Its avowed purpose was to aid the building of the railroad by placing in the hands of the railroad company the bonds of assenting municipalities. These bonds were intended for sale; and it was rationally to be expected that they would be put upon distant markets. It must have been considered, that the higher the price obtained for them the more advantageous would it be for the company, and for the cities and towns which gave the bonds in exchange for capital stock. Everything that tended to depress the market value was adverse to the object the legislature had in view. It could not have been overlooked that their market value would be disastrously affected if the distant purchasers were under obligation to inquire before their purchase, or whenever they demanded payment of principal or interest, whether certain contingencies of fact had happened before the bonds were issued, — contingencies the happening of which it would be almost impossible for them in many cases to ascertain with certainty. Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the legislature had in view; namely, aid in the construction of the road. Such an interpretation ought not to be given to the statute if it can reasonably be avoided; and we think it may be avoided.

At some time or other, it is to be ascertained whether the directions of the act have been followed; whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met. This presumption is strengthened by the provisions of the twelfth section, which make it the duty of the clerk to transmit to the county clerk a transcript or statement, verified by his oath, of the vote given, with other particulars, in case a subscription has been voted. How is he to perform this duty if he is not to conduct the election, and to determine what the voters have decided? If, therefore, there could be any obligation resting on persons proposing to purchase the bonds purporting to be issued under such legislative authority, and in accordance with a popular vote, to inquire whether the provisions of the statute had been followed, or whether the conditions precedent to their lawful issue had been complied with, the inquiry must be addressed to the town clerk or executive officer of the municipality, — to the very person whose duty it was to ascertain and decide what were the facts. The more the statute is examined, the more evident does this become. The eleventh section (quoted above) declared, that if it should appear that a majority of the legal voters of the city, town.

or township, voting, had voted "for subscription," the executive officer and clerk should subscribe and execute bonds. "If it should appear," said the act. Appear when? Why, plainly, before the subscription was made and the bonds were executed; not afterwards. Appear to whom? In regard to this, there can be no doubt. Manifestly not to a court, after the bonds have been put on the market and sold, and when payment is called for, but if it shall appear to the persons whose province it was made to ascertain what had been done preparatory to their own action, and whose duty it was to issue the bonds if the vote appeared to them to justify such action under the law. These persons were the supervisor and town clerk. Their right to issue the bonds was made dependent upon the appearance to them of the performance of the conditions precedent. It certainly devolved upon some person or persons to decide this preliminary question; and there can be no doubt who was intended by the law to be the arbiter. In *Commissioners v. Nichols*, 14 Ohio St. 260, it was said that "a statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock subscriptions, or otherwise, to complete a certain railroad, and imposing upon them the duty of delivering the bonds when such provision had been made, without indicating any person or tribunal to determine that fact, necessarily delegates that power to the commissioners; and, if delivered improvidently, the bonds will not be invalidated."

In the present case, the person or persons whose duty it was to determine whether the statutory requisites to a subscription and to an authorized issue of the bonds had been performed were those whose duty it was also to issue the bonds in the event of such performance. The statute required the supervisor or other executive officer not only to subscribe for the stock, but also, in conjunction with the clerk, to execute bonds to the railroad company in the name of the town for the amount of the subscription. The bonds were required to be signed by the supervisor or other executive officer, and to be attested by the clerk. They were so executed. The supervisor and the clerk signed them; and they were registered in the office of the auditor of the State, in accordance with an act, requiring that, precedent to their registration, the supervisor must certify under oath to the auditor that all the preliminary conditions to their issue required by the law had been complied with. On each bond the auditor certified the registry. It was only after this that they were issued. And the bonds themselves recite that they "are issued under and by virtue of the act incorporating the railroad company," approved March 24, 1869, "and in accordance with the vote of the electors of said township of Coloma, at a regular election held July 28, 1869, in accordance with said law." After all this, it is not an open question, as between a *bona fide* holder of the bonds and the township, whether all the prerequisites to their issue had been complied with. Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment.

The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. They have declared the contingency to have happened; on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond those a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others, — to those most competent to decide it, — and which the purchaser is, in general, in no condition to decide for himself.

This we understand to be the settled doctrine of this court. Indeed, some of our decisions have gone farther. In the leading case of *Knox v. Aspinwall*, 21 How. 544, the decision was rested upon two grounds. One of them was that the mere issue of the bonds, containing a recital that they were issued under and in pursuance of the legislative act, was a sufficient basis for an assumption by the purchaser that the conditions on which the county (in that case) was authorized to issue them had been complied with; and it was said that the purchaser was not bound to look farther for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to *The Royal British Bank v. Torquand*, 6 Ell. & Bl. 327, a case in the Exchequer Chamber, which fully sustains it, and the decision in which was concurred in by all the judges. This position taken in *Knox v. Aspinwall* has been more than once reaffirmed in this court. It was in *Moran v. Miami County*, 2 Black, 732; in *Mercer County v. Hackett*, 1 Wall. 83; in *Supervisors v. Schenk*, 5 id. 784; and in *Mayor v. Muscatine*, 1 id. 384. It has never been overruled; and, whatever doubts may have been suggested respecting its correctness to the full extent to which it has sometimes been announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox v. Aspinwall*. That, we think, has been so firmly seated in reason and authority, that it cannot be shaken. What it is has been well stated in sect. 419 of *Dillon on Mun. Corp.* After a review of the decisions of this court, the author remarks, "If, upon a true construction of the legislative enactment conferring the authority (*viz.*, to issue municipal bonds upon certain conditions), the corporation, or certain officers, or a given body or tribunal, are invested with power to decide whether the condition precedent has been complied with, then it may well be that their determination of a matter *in pais*, which they are authorized to decide, will, in favor of the bondholders for value, bind the corporation." This is a very cautious statement of the doctrine. It may be restated in a slightly different form. Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment

that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal. In *Bissell v. Jeffersonville*, 24 How. 287, it appeared that the common council of the city were authorized by the legislature to subscribe for stock in a railroad company, and to issue bonds for the subscription, on the petition of three-fourths of the legal voters of the city. The council adopted a resolution to subscribe, reciting in the preamble that more than three-fourths of the legal voters had petitioned for it, and authorized the mayor and city clerk to sign and deliver bonds for the sum subscribed. The bonds recited that they were issued by authority of the common council, and that three-fourths of the legal voters had petitioned for the same, as required by the charter. In a suit subsequently brought by an innocent holder for value to recover the amount of unpaid coupons for interest, it was held inadmissible for the defendants to show that three-fourths of the legal voters of the city had not signed the petition for the stock subscription. A similar ruling was made in *Von Hostrop v. Madison City*, 1 Wall. 291, and in *Mercer County v. Hackett*, *id.* 83.

The same principle has recently been asserted in this court after very grave consideration, and it must be considered as settled. In *St. Joseph's Township v. Rogers*, 16 Wall. 644, it is stated thus:

"Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all of these recitals were incorrect will not constitute a defense for the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation condition, or qualification, which it is alleged was not fulfilled."

There is nothing in the case of *Marsh v. Fulton Co.*, 10 Wall. 675, to which we have been referred, at all inconsistent with the rule thus asserted. In that case, there were no recitals, in the bonds; and there was no decision that the conditions precedent to a subscription, or to the gift of authority to subscribe, had been performed. The question was, therefore, open.

What we have said disposes of the present case without the necessity of particular consideration of the matters urged in the argument of the defendant below. It was inadmissible to show what was attempted to be shown; and even if it had been admissible the effort to assimilate the case to *Marsh v. Fulton Co.* would fail. There the subscription was for

the stock of a different corporation from that for which the people had voted; here it was not.

Judgment affirmed.

[The concurring opinion of BRADLEY, J., is omitted. JJ. MILLER, DAVIS and FIELD dissented. See dissenting opinion of MILLER, J., in *Humboldt Township v. Long*, 92 U. S. 642.]

5. *Liability for Interest*

FRIEND v. CITY OF PITTSBURGH †

131 Pa. St. 305. 1890

ON February 11, 1888, John W. Friend brought *assumpsit* against the city of Pittsburgh upon a municipal bond issued by the defendant. The plea was *non-assumpsit*.

MR. CHIEF JUSTICE PAXSON: This suit was brought in the court below against the city of Pittsburgh to recover the amount due on a bond given by said city, and payable by installments. There was no dispute as to the amount of the bond, nor that the respective installments were all due; the contention was over the question of interest on the respective installments after their maturity.

It appeared upon the trial below that no demand had ever been made by the holder of the bond for payment, and that for a portion of the time, at least, the money had been provided for its payment, and was in the city treasury. Under these circumstances the learned judge instructed the jury as follows: "Therefore, as I say, the simple question is this: Did the city of Pittsburgh provide the means for the payment of these bonds? If she did, before the maturity of the bond, that is, by the maturity of the last payment, then the interest would stop from that date, and you will fix the time when that provision was made. As I have said before, the evidence does not satisfy me that a provision was made before 1880. It is a question of fact, however, for you, and you will fix the time, and allow interest on the installment from the time it came due, up until the time that you find that the city had provided for the payment of the bonds. That is all the interest the plaintiff is entitled to, in my judgment." This and other instructions of like tenor were assigned for error here.

The contention of the plaintiff is that a municipal corporation, like an individual, must seek out its creditor, if it desires to stop interest, and tender him the money due. If this contention is well founded, the effect of it will be to work a revolution in the mode of transacting

business with such municipalities. Singularly enough, the precise point does not appear to have been decided in this State; yet there are plenty of *dicta* scattered through our books, which plainly show the bent of the judicial mind. In the case of *Luzerne Company v. Day*, 23 Pa. 141, it was said by this court: "When a legal claim is presented for payment, it is the duty of the commissioners to draw their warrant for its payment. If this is refused, or if the order is not paid when demanded, a suit will lie against the county; but, until demand is made, neither the commissioners nor the county are in default, and without it a suit cannot be maintained." And in *Allison v. Juniata Co.*, 50 Pa. 351, it was held that the holder of a county warrant or order cannot recover interest, even after demand and non-payment for want of funds.

It is true these cases were put partly upon the ground that such orders are neither bills, notes, checks, nor contracts, nor even a satisfaction of the original indebtedness. Had the action been upon such original indebtedness, as was said in *Dyer v. Covington Tp.*, 19 Pa. 200, the court could decide whether it was a case for the allowance of interest or not. In *Emlen v. Navigation Co.*, 47 Pa. 76, it was said by Justice Read in discussing the general rule upon the allowance of interest: "There are, however, exceptions to the general rule, as in the case of banks, who are the debtors of their depositors, and of trustees who have not failed in the discharge of their trusts. And we must undoubtedly add the cases in which the United States and the several States have been prepared to pay their loan holders when their loans fell due, of which it is their practice to notify their creditors beforehand. . . . The result is that these debts are payable at a fixed period, . . . at which time and place the loan holder is to present his evidence of debt and receive payment. Whether he does or not, interest stops from that moment." The point decided in that case was that the Lehigh Coal & Navigation Company was not bound to seek its creditor in a foreign country, and make a tender, in order to stop interest.

In the State of Illinois it has been repeatedly decided that municipal corporations are not bound to discharge their indebtedness elsewhere than at their treasuries: *City of Pekin v. Reynolds*, 31 Ill. 529; *People v. Taxwell Co.*, 22 Ill. 147; *Johnson v. Stark Co.*, 24 Ill. 75; *South Park Commissioners v. Dunlevy*, 91 Ill. 49. It must be conceded that this is the rule applicable to the United States and to the several States. And the rule does not depend upon the fact alone that in such instances no suit would lie. It rests upon the broader ground of public policy and public convenience, and the further reason that, as to all municipal organizations or governments, the municipal treasury is the recognized place where all claims against it shall be paid. This rule has been recognized by common consent, by every person, and in every place. The reason of it applies with equal force to a city as to a State. The only difference between them is that one can be sued;

the other cannot. It would entail intolerable inconvenience if the rule were otherwise. The bonds of some municipal corporations are largely held in every State in the Union, and in nearly every nation abroad. It is impossible, in many instances, for such corporations to know their creditors, or where they reside. To hold that they must find them and tender the amount of their debt, before interest could be stopped, would entail endless confusion, and do no practical good. Their obligations are as much payable at their treasury as if so "nominated in the bond," and it is so understood by all who deal with them.

We regard the instructions of the court below as favorable to the plaintiff as he was entitled to. There is nothing in the remaining specifications of error which requires discussion.¹

Judgment affirmed.

¹ In *Chicago v. N. W. Mutual Insurance Co.*, 218 Ill. 40, the plaintiff sued to recover back money paid to the city under protest as water charges, which the court held to have been illegally exacted. WILKIN, J., said:

"Complaint is made that the court allowed interest on the various amounts from the date of payment by appellee to the date judgment was rendered. We do not think there was any error, for the reason that appellant wrongfully took from appellee the sum of \$1,564.94 and had it in its possession from that time until the present. As a general rule, a municipal corporation is not liable for interest unless so required by special contract or by statute, but in case where a municipal corporation wrongfully exacts money and holds that money without just right or claim, it is liable for interest on the same. *Vider v. City of Chicago*, 154 Ill. 354; *City of Danville v. Danville Water Co.*, 180 *id.* 235."

CHAPTER IX

LIABILITY FOR TORTS

1. *For the Torts of Officers and Employees, under the Rule Respondet Superior*

DARGAN v. MAYOR, ETC., OF MOBILE *

31 Ala. 469. 1858

APPEAL from the Circuit Court of Mobile. Action for damages for the loss of a slave, which, the plaintiff alleges, was negligently killed by police officers of the city while attempting to arrest the slave for violating the city ordinances. The ordinances concerned are adverted to in the opinion of the court. A demurrer to the complaint was sustained by the Circuit Court.

E. S. Dargan, pro se.

Daniel Chandler, contra.

WALKER, J. The corporation of the city of Mobile had authority to pass ordinances providing for the arrest and punishment of slaves abroad in the city, after nine o'clock at night, without written permission; or assembling in numbers of four or more, off the owner's premises, without the permission of the mayor or one of the aldermen. — See the charter of the city, in Pamphlet Acts of 1843-44, p. 180, § 15. This power was purely political in its character, and exclusively for the benefit of the public. As to that power, the corporation was a government, *imperium in imperio*. The employment of the officer for whose negligence in the discharge of his duty the corporation is sued, was the necessary, proper, and authorized means for the execution of that power; and the action of the officer, from its nature, was not susceptible of supervision by the corporation. See 37th section of charter. In the legislative adoption of the ordinances described in the pleading, and in the appointment of the officer, the corporation exercised a lawful authority. It is not alleged that the corporation was guilty of any negligence or misconduct in the selection of the officer.

The question here is not as to the liability of a corporation for the omission to discharge its duty; nor for the performance of an unlawful act by it or its authority; nor for the exercise of a power not delegated; nor for the negligence of its agents, or officers, in the perform-

*its nature is so different
that it is not infer*

ance of an act for the private benefit of the corporation, or done under the immediate supervision of the corporation. The question of this case is, whether a municipal or public corporation is liable in damages, for an injury resulting from the careless or negligent official conduct of one of its officers, in whose selection there was no negligence, and whose employment was the lawful and necessary means of executing a governmental power vested in it for the public benefit, and whose acts are not done under the supervision of the corporation. This question we decide in the negative.

Because the corporation is, as to the passage of the ordinances and the appointment of the officer described in the pleadings, a government, exercising political power, it is irresponsible for the official misconduct alleged, upon the same principle which generally protects governments and public officers from liability for the misfeasances and malfeasances of persons necessarily employed under them in the public service. — *Story on Agency*, §§ 319, 319a, 319b, 320, 321; *Dunlap's Paley's Agency*, 376. Municipal corporations, *quoad hoc* stand upon the same foundation with public officers, counties, townships, and other *quasi* corporations, charged with some public duty, or invested with some portion of the authority of the government, where the employment of officers is necessary and lawful. [The court then reviewed a number of early decisions.] . . .

The judgment of the court below is affirmed.

HAYES v. CITY OF OSHKOSH *

33 Wis. 314. 1873

ACTION against the city for damages. There was evidence that plaintiff's property was set on fire by sparks allowed to escape from fire engines of the city, by the negligence of engineers while using the engines to put out a fire on other property. The engineers were members of the fire department, employed and paid by the city. The charter provided that, "The common council shall procure fire engines" etc., and have charge and control of the same;" and have power to appoint and pay officers and firemen, specify their duties, and remove them at pleasure.

A verdict was directed for defendant. Plaintiff appealed.

C. Coolbaugh & Son, for appellant.

W. R. Kennedy (Gabe Bouck with him), for the city.

DIXON, C. J. The question presented in this case is settled by authority as fully and conclusively as any of a judicial nature can ever

be said to have been. The precise question may not have been heretofore decided by this court, but a very similar one has, and the governing principle recognized and affirmed. *Kelley v. Milwaukee*, 18 Wis. 83. Neither the charter of the city of Oshkosh, nor the general statutes of this State, contain any peculiar provision imposing liability in cases of this kind; and the decisions elsewhere are numerous and uniform, that no such liability exists on the part of the city. The case made by the plaintiff is in no material respect distinguishable from those adjudicated in *Hafford v. New Bedford*, 16 Gray, 297, and *Fisher v. Boston*, 104 Mass. 87, as well as in several other reported decisions cited in the briefs of counsel, and in all of which it was held that the actions could not be maintained.

The grounds of exemption from liability, as stated in the authorities last named, are, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants, or of the community; that the members of the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be held liable, but they act rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given; and hence the maxim *respondet superior* has no application.

The reasons thus given are satisfactory to our minds, and lead to a conclusion which on the whole seems to us to be just and proper. Individual hardship or loss must sometimes be endured in order that still greater hardship or loss to the public at large or the community may be averted. It would seem to be a hard rule which would hold the city responsible in damages in such cases, when the work in which it or rather its public officers are engaged, is one of mere good will, a charity, so to speak, designed for the relief of suffering members of the community, or it may be of the entire people of a district. If the legislature sees fit to enact such liability, so let it be; but, in the absence of such enactment, we must hold the liability does not exist.

BY THE COURT. — Judgment affirmed.¹

¹ In *Wilcox v. Chicago*, 107 Ill. 334, which was an action to recover damages caused by the negligence of the driver of a hook and ladder wagon in colliding with plaintiff's carriage, WALKER, J., said:

"The question presented is, whether the relation of master and servant exists between the driver of the ladder wagon and the city and [so that] it is responsible for the negligent acts of the driver whenever engaged in the performance of his duty under the ordinance of the city, or whether the relation is an exception to the general rule. It has long been settled, and perhaps never questioned, that the master is liable for injury from the negligent acts of his servant whilst performing acts within the line of his duty. But the whole question here turns upon whether that relation exists.

"Appellant contends that inasmuch as the city voluntarily undertook to, and did,

WILCOX v. CITY OF ROCHESTER †

190 N. Y. 137. 1907

APPEAL from a judgment of the Appellate Division of the Supreme Court affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

Action for damages for personal injuries. The plaintiff was injured, as he alleges, by reason of the negligence of an employee of the city in charge of the elevator in the police station. The evidence tended to show that the employee came out of the elevator and left the door open; that the plaintiff, supposing that the elevator had remained in position, stepped through the door and fell to the bottom of the shaft. The elevator had been moved upward and away from the door by a police telegraph operator.

William A. Sutherland, for appellant.

George B. Draper, for respondent.

WILLARD BARTLETT, J. . . . The more serious question involved in this appeal is presented by the proposition urged upon us in behalf of the appellant, that in no event can the city of Rochester be held liable for any alleged neglect on the part of an employee in the police department for operating in any manner an elevator in the police building.

organize a fire department, which is under the entire control of the city, and as it appoints its officers, pays them and the firemen, and discharges them through its officers, and the whole department is controlled, regulated, and its duties prescribed, by city ordinance, nothing more can be required to create the relation of master and servant between it and its employees. The department is as completely under the control of the city as the board of public works, or any other department of the city government. . . .

"On turning to the reported cases of the courts of other States, we find a uniform line of decisions holding that cities are not liable for the negligent acts of the officers or men employed in their fire departments whilst in the discharge of their duty, thus creating an exception in this class of cases to the general rule of *respondet superior*. In his work on *Municipal Corporations*, Dillon (1st ed. § 774) says: 'So, although a municipal corporation has power to extinguish fires, to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, it is not liable for the negligence of the firemen appointed and paid by it, who, when engaged in the line of their duty, upon an alarm of fire, ran over the plaintiff, in drawing a hose reel belonging to the city, on their way to the fire; nor for injuries to the plaintiff caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department. The exemption from liability is placed upon the ground that the service is performed by the corporation in obedience to an act of the legislature, — is one in which the corporation has no particular interest, and from which, it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed by the city corporation, are not the agents and servants of the city, for whose conduct it is liable, but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city without being expressly given, and the maxim *respondet superior* has, therefore, no application.' He refers to the cases of *Hafford v. New Bedford*, 16 Gray, 297, and *Fisher v. Boston*, 104 Mass. 87, which support the text. In New York the same doctrine is applied in *Maximilian v. Mayor*, 62 N. Y. 160, and *Smith v. Rochester*, 76 id. 513. In Connecticut, in the case of *Jewett v. New Haven*, 38 Conn. 368. In Iowa, in *Ogg v. Lansing*, 35 Ia. 495, and *Field v. Des Moines*, 39 id. 575. In Missouri, by *Heller v. Mayor*, 53 Mo. 159. In California, in *Howard v. San Francisco*, 51 Cal. 52. The same doctrine has been announced by the Supreme Court of Ohio." The court held that the city was not liable.

126 Notes on Municipalities.

The argument is that the defendant, although a municipal corporation, was engaged solely in the discharge of public governmental functions as distinguished from municipal functions, in the maintenance, management, and repair of the police station, and therefore, under the doctrine of *Maximilian v. Mayor, etc., of N. Y.* (62 N. Y. 160) and similar cases, is not responsible for the acts or omissions of those engaged in applying the building to such public purposes of government. This was evidently the view entertained by the learned justice who dissented in the Appellate Division. He wrote no opinion, but simply placed his dissent upon the authority of *Snider v. St. Paul* (51 Minn. 466), where the Supreme Court of Minnesota held, in reference to an elevator accident in the St. Paul city hall, that the duty of providing and maintaining a city hall was a public and governmental one and, therefore, the city was not responsible for the negligence of its officers, agents, or servants in the management of such building.

The broad general doctrine of the *Maximilian* case, which is certainly not now open to question in the courts of this State, is that "two kinds of duties are imposed on municipal corporations, the one governmental and a branch of the general administration of the State, the other quasi private or corporate;" and "that in the exercise of the latter duties the municipality is liable for the acts of its officers and agents, while in the former it is not." (Cullen, J., in *Lefrois v. County of Munroe*, 162 N. Y. 563, 567.) The question which confronts us, on the branch of this appeal now under consideration, is whether the duty exercised by the city of Rochester, under the general statutes relating to cities of the second class, of maintaining and caring for a police station, is a governmental duty appertaining to the general administration of the State or a duty imposed and undertaken for the benefit of the municipality as a corporate body. If it falls within the first of these categories, the present action cannot be maintained.

To my mind, it seems perfectly clear that if there is any logical validity in the distinction laid down in the *Maximilian* case, and so firmly established by the subsequent decisions of this court, it must be applied in favor of the defendant and appellant here. What powers and duties are there which can be conferred and imposed upon a municipality that more clearly constitute a function of general government than the power and duty to maintain a police force and provide suitable buildings for its occupation and use? The agency which caused the accident out of which the *Maximilian* case arose was the driving of an ambulance wagon through the streets of New York by an employee of the commissioners of public charities and corrections. The statutory duties of the department of which the commissioners were the head were to care for paupers, destitute children, lunatics, and certain classes of offenders. This court held that these functions were "acts to be done by them in their capacity as public officers in the discharge of duties imposed upon them by the legislature for the public benefit;" and that

they were not acts done for the city of New York "in what may be called its private character, in the management of property or rights voluntarily held by it for its own immediate profit or advantage as a corporation, though inuring ultimately to the benefit of the public."

The general governmental character of the functions of the police in our cities strikes me as much more apparent than was such character on the part of the commissioners of public charities and corrections in *Maximilian v. Mayor, etc., of N. Y.* (*supra*). For one thing, their powers were strictly local, while in some respects the powers of municipal police officers extend throughout the entire State. . . . The suggestion is made, however, that inasmuch as the alleged negligence in the present action was not the omission of a police officer or member of the police force assuming to act as such, but was done by an employee of the city engaged in the maintenance of a police station, the rule which denies the application of the doctrine of *respondet superior* to the torts or negligent acts of police officers does not apply. This proposition simply brings us back to the question whether the safe and proper maintenance of a police station building is not an appropriate, not to say necessary, element in the maintenance of a police force; and if it is, whether it is not the exercise of a public governmental function. I have already indicated that I think these questions must be answered in the affirmative. The evidence leaves no doubt as to the character of this building. The city engineer, who had been in office several years, and was its custodian, testified: "Since I have had charge of it, it has been occupied as headquarters for the police department and by the police court — nothing else. There are four stories in the building. The police telephone system is on the top story — police patrol and fire alarm. There is a portion of the fire alarm there and the police patrol calls. The third is the women's cells and matron's room. The second floor is the men's cells and the court room. The first floor is the assembly hall and the office of the captain and some other officers. The assembly hall is where the policemen assemble and are given their instructions. That is the use to which the building has been put during all the time I have been city engineer, and to no other purpose."

It thus appears that the structure was used in part as a jail for prisoners, as well as in part for the accommodation of the police force of the city of Rochester. The weight of judicial authority in this country is in favor of the doctrine that the maintenance of a jail is a governmental function (*Lahner v. Town of Williams*, 112 Ia. 428; *Gray v. Mayor, etc., of Griffin*, 111 Ga. 361; *Le Clef v. City of Concordia*, 41 Kans. 323; *City of New Kiowa v. Craven*, 46 Kans. 114; *Gullikson v. McDonald*, 62 Minn. 278; *Brown v. Town of Guyandotte*, 34 W. Va. 299); although a contrary view has been entertained in North Carolina (*Shields v. Town of Durham*, 118 N. C. 450) and by a Federal judge in the fourth circuit (*Edwards v. Town of Pocahontas*, 47 Fed. Rep. 268). I think that the prevailing view is based on sound reason, and that it

is equally applicable to a police station, such as this was in Rochester. It was actually applied to a police station in the case of *Kelley v. Cook* (21 R. I. 29), where the defendant, city treasurer, was sued as the representative of the city of Woonsocket to recover damages for the negligence of the city in caring for a person who had been unlawfully arrested by a police officer and incarcerated in a police station, and by reason of the city's neglect to provide for him therein, was rendered so ill that he died. The court said: "In the temporary care of persons under arrest the city by its police department is aiding in the enforcement of the laws and thus discharging a public duty for which it receives no pecuniary benefit, and for the manner in which it discharges this duty it is legally responsible to no one. The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity but in the interest of the people."

I cannot see that any distinction can logically be drawn which will take this case out of the rule which defeated the plaintiff in *Maximilian v. Mayor* (*supra*), growing out of the fact that the person or persons whose alleged negligence caused the accident here were not at the time actually endeavoring to exercise any authority over the plaintiff, or with reference to the plaintiff, *as officers or members of the police force*. If their acts were in aid of the maintenance of the police station, and such maintenance by the municipality was as much the exercise of a public governmental function as was the organization or the regulation or the discipline of the police force itself, then the non-liability of the city depends on the character of the duties thus imposed and assumed, and not at all on the relation to the municipality of those affected by the manner in which such duties may be discharged. . . .

Judgment reversed, etc.

HAIGHT, J., dissented. [His opinion is here omitted. Three judges concurred with WILLARD BARTLETT, J., in the above opinion, and two concurred on another ground.]

BAILEY *et al.* v. MAYOR, ETC., OF NEW YORK *

3 Hill (N. Y. Supreme Ct.) 531. 1842

CASE, to recover damages for the destruction of plaintiff's mill property on the Croton River by the bursting of a dam on that river. The plaintiffs allege that the bursting of the dam was the result of the negligence of agents and servants of the defendant in charge of constructing and maintaining it.

At trial, it appeared that the dam had been built under the direction

of water commissioners, appointed by the governor for the purpose, in pursuance of certain special statutes. These statutes provided that the commissioners should prepare and submit to the city council a plan for supplying the city with water; and that upon the favorable vote of the city council, and of the electors of the city, and the furnishing of funds therefor by the city council, the commissioners should construct the works. Under the ordinance which instructed the commissioners to proceed with the work, securities of the city were to be issued to provide funds; and revenues, which were to be derived from furnishing water to the inhabitants, were to be devoted first to redeeming the securities. The compensation of the commissioners was to be paid by the city.

Plaintiffs excepted to the rejection of evidence that the dam was negligently and unskillfully constructed.

A. S. Johnson & E. P. Hurlbut, for the plaintiffs.

P. A. Cowdrey & D. B. Tallmadge, for the defendants.

NELSON, C. J. The principal ground taken at the circuit against this action, and the one upon which it is understood the cause there turned was, that the defendants were not chargeable for negligence or unskillfulness in the construction of the dam in question; inasmuch as the water commissioners were not appointed by them, nor subject to their direction or control. In other words, the commissioners not being their agents in the construction of the dam, the rule *respondent superior* could not properly be applied.

Another ground is now taken, which I will first notice, viz., that admitting the water commissioners to be the appointed agents of the defendants, still the latter are not liable, inasmuch as they were acting solely for the State in prosecuting the work in question, and therefore are not responsible for the conduct of those necessarily employed by them for that purpose. We admit, if the defendants are to be regarded as occupying this relation, and are not chargeable with any want of diligence in the selection of agents, the conclusion contended for would seem to follow. They would then be entitled to all the immunities of public officers charged with a duty which, from its nature, could not be executed without availing themselves of the services of others; and the doctrine of *respondent superior* does not apply to such cases. If a public officer authorize the doing of an act not within the scope of his authority, or if he be guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible; but not for the misconduct or malfeasance of such persons as he is obliged to employ. *Hall v. Smith*, 2 Bing. 156; *J. B. Moore*, 226 S. C.; *Humphreys v. Mears*, 1 Man. & Ryl. 187; *Bolton v. Crowther*, 4 Dowl. & Ryl. 195; *Harris v. Baker*, 4 Maule & Selw. 27.

But this view cannot be maintained upon the facts before us. The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, con-

1st obj.
affidavit
affidavit
affidavit

2d obj.
action
state
not negligent
state

ferred for the benefit of the public. The grant is a special, private franchise, made as well for the private emolument and advantage of the city, as for the public good. The State, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment under the law and the revenue and profits to be derived therefrom, are a part of the private property of the city; as much so as the lands and houses belonging to it, situate within its corporate limits.

The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body — such as are granted exclusively for public purposes to counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred. *Dartmouth College v. Woodward*, 4 Wheat. 668, 672; *Philips v. Bury*, 1 Ld. Raym. 8, 2 T. R. 352, s. c.; *Allen v. McKeen*, 1 Sumner, 297; *The People v. Morris*, 13 Wend. 331, 338; 2 *Kent's Com.*, 275, 4th ed.; *U. S. Bank v. Planter's Bank*, 9 Wheat. 907; *Clark v. Corp. of Washington*, 12 *id.* 40; *Moodalay v. The East India Co.*, 1 Brown's Ch. R. 469. Suppose the legislature, instead of the franchise in question, had conferred upon the defendants banking powers, or a charter for a railroad leading into the city, in the usual manner in which such powers are conferred upon private companies; could it be doubted that they would hold them in the same character, and be subject to the same duties and liabilities? I cannot doubt but they would. These powers in the eye of the law would be entirely distinct and separate from those appertaining to the defendants as a municipal body. So far as related to the charter thus conferred, they would be regarded as a private company and be subject to the responsibilities attaching to that class of institutions. The distinction is well stated by the master of the rolls in *Moodalay v. The East India Company* (1 Brown's Ch. R. 469), in answer to an objection made by counsel. There the plaintiff

had taken a lease from the company, granting him permission to supply the inhabitants of Madras with tobacco for ten years. Before the expiration of that period, the company dispossessed him, and granted the privilege to another. The plaintiff, preparatory to bringing an action against the company, filed a bill of discovery. One of the objections taken by the defendants was, that the removal of the plaintiff was incident to their character as a sovereign power, the exercise of which could not be questioned in a bill or suit at law. The master of the rolls admitted that no suit would lie against a sovereign power for anything done in that capacity; but he denied that the defendants came within the rule. "They have rights," he observed, "as a sovereign power, they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company they have entered into a private contract, to which they must be liable." It is upon the like distinction that municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly. As such, they are bound to repair bridges, highways, and churches; are liable to poor rates; and, in a word, to the discharge of any other duty or obligation to which an individual owner would be subject. 2 Inst. 703; *Thursfield v. Jones*, Sir T. Jones, 187; *Rex v. Gardner*, Cowp. 79; *Mayor of Lynn v. Turner*, *id.* 87; *Henly v. Mayor of Lyme*, 5 Bing. R. 91, 1 Bing. N. C. 222, s. c. in the House of Lords.

Regarding the defendants then in the light of any other private company upon whom the like special franchises had been conferred, the next question is, whether the water commissioners charged with the immediate superintendence and execution of the work stand in the relation of agents deputed by the defendants to perform this duty. If they do, it is not denied, in this aspect of the case, that the defendants are answerable to the plaintiffs for any damages sustained through the negligence or unskillfulness of the commissioners. The question depends mainly upon a construction of the Act of 1834. . . .

We have already given our views of the character of this work, and of the capacity in which the defendants hold the powers under which it has been executed. If we are not mistaken in that conclusion, and they are to be regarded as a private company, like any other body of men upon whom special franchises have been conferred for their own private advantage — such as banking and railroad corporations — then the appointment of the agents by the State did not make them less the agents of the defendants. The appointment in this way is but one of the conditions upon which the charter was granted; and stands on the footing of any other condition to be found in the grant, subject to which it has been accepted. By accepting the charter, the defendants thereby adopted the commissioners as their own agents to carry on the work. The acceptance was entirely voluntary; for the State could not enforce

the grant upon the defendants against their will. This would be so upon general principles (*A. & A. on Corp.*, 46, 50, and cases there cited); but here, the *charter itself* left it optional with the common council of the city to accept or not. (§ 7.) The undertaking of the work was made to depend upon the approval of the plan of the commissioners, which necessarily involved the right to adopt or reject the work itself altogether, if they disliked the system prescribed by the legislature. The approval having taken place, this, together with the subsequent measures of the common council instructing the commissioners to proceed in the execution of the work, constituted them the agents of the defendants, as effectually so as if the latter had originally appointed them. The act of adoption in the one case was as free and voluntary as the appointment in the other. . . .

New trial granted.

DUGGAN *v.* INHABITANTS OF PEABODY *

DUGGAN *v.* SAME

187 *Mass.* 349. 1905

Two actions of tort, one by Mary W. Duggan for personal injuries from being struck on the head by a piece of stone from a blast in the stone quarry of the defendant maintained for the preparation of stone to be used in repairs of highways, and the other by James Duggan, husband of Mary, for the loss of her services and companionship by reason of the injuries.

Defendant alleges exceptions to the refusal of the court to order verdicts for defendants.

J. J. Cahill & N. D. Crowley, for the defendant.

W. H. Niles, for the plaintiffs.

KNOWLTON, C. J. The plaintiff in the first case, while on her own premises not far from the defendant's quarry, was struck on the head and injured by a stone thrown from a blast in the quarry, and her husband, James Duggan, suffered damages on account of her injuries. It was conceded by the defendant at the trial, that she was in the exercise of due care, and that the blast was negligently exploded.

One Hooper, who was the superintendent of streets duly appointed by the selectmen, was in charge of the work, and the only question is whether the defendant is liable for his negligence. For his negligence as a public officer, acting under the authority of law in the performance of the duties of his office in regard to matters which involve no element of profit or income to the town, but were imposed solely in the interest of the general public, the town is not liable. *Hafford v. New Bedford*, 16

Gray, 297; *Walcott v. Swampscott*, 1 Allen, 101; *Buttrick v. Lowell*, 1 Allen, 172. If the enterprise in which he was engaged was conducted primarily as a work of the town, imposed upon it for the benefit of the public, but in part as a source of income, a commercial element was introduced which made him to that extent at least an agent of the town, and which deprived the town of the exemption from liability for negligence which pertains to the performance of duties that are strictly public.

The purchase of real estate, to be paid for by a town and used as a stone quarry, is not ordinarily within the authority of a superintendent of streets acting merely as a public officer, and as such an officer he probably would have no right to take in charge such a quarry belonging to a town to carry on the business of quarrying and crushing stone there, even for use upon the public streets, unless the town authorized or permitted him to do so. In the present case the town has for years been making sales of broken stone from this quarry. In the year ending January 15, 1898, there were three sales amounting to \$11.50. In the next year there were seven sales amounting to \$189.37, in the next year six sales amounting to \$460.88, in the next year twelve sales amounting to \$1,193.65, and in the year of the accident there were twenty-four sales amounting to \$352.40. The money received for these sales went into the hands of the town treasurer, some of it by payments to him directly and some through the superintendent of streets. In his annual reports to the town, the treasurer accounted for all these moneys, and the amounts so received also appeared in the annual town report published by the selectmen. We think these facts bring the case within the principles stated in *Collins v. Greenfield*, 172 Mass. 78; *Neff v. Wellesley*, 148 Mass. 487, 493; and *Worden v. New Bedford*, 131 Mass. 23. See also *Waldron v. Haverhill*, 143 Mass. 582; *Sullivan v. Holyoke*, 135 Mass. 273, 277; *Oliver v. Worcester*, 102 Mass. 489, 500; *Norton v. New Bedford*, 166 Mass. 48, 52; *Hawkes v. Charlemont*, 107 Mass. 414; *Aldrich v. Tripp*, 11 R. I. 141.

In *Neff v. Wellesley*, *ubi supra*, the principle is stated as follows: "When property is used or business is conducted by a town principally for public purposes, under the authority of the law, but incidentally and in part for profit, the town is liable for negligence in the management of it."¹ In *Collins v. Greenfield*, *ubi supra*, the plaintiff's intestate was injured while at work about a stone crusher in preparing stone for use in macadamizing streets. Some income was received from the business,

¹ *Neff v. Wellesley* was an action against a town to recover damages for personal injuries caused by the negligence of a person employed by the town in connection with its almshouse or poor-farm, and who, while driving through a street in a wagon used in connection with the farm, negligently drove the horse upon the plaintiff. The evidence showed that, although the poor-farm was maintained principally for the support of the town's paupers, paupers of another town and of the State were boarded there at a price per week; employees of the town working in its highway department were boarded there; and surplus produce from the farm was sold, or exchanged for other supplies. It was held that the town was liable.

derived in part from payments of a street railway company and in part from small sales of crushed stone. The work was in charge of the superintendent of streets. It was held that the town was liable for his negligence. The same principle is applied in *Worden v. New Bedford*, *ubi supra*, and in other cases. In *Murphy v. Needham*, 176 Mass. 422, the plaintiff's intestate was injured while engaged in getting out gravel in a gravel pit, and the facts in regard to the crushed stone were held to be too remote to affect the plaintiff's case.

It was contended in *Neff v. Wellesley*, and in *Worden v. New Bedford*, and in other cases, that there was no liability because the use of the property for profit was *ultra vires*; but the defense was not sustained, as it was held that an incidental use resulting in profit, from property acquired and held primarily for a public purpose, was legitimate. See also, as overruling this defense on another ground, *Nims v. Mount Hermon Boys' School*, 160 Mass. 177. It is objected that there was no vote of the town authorizing the sale of crushed stone, or particularly referring to it. But the business was carried on for years in an open way, and was annually referred to in the reports of the selectmen and town treasurer, made to the inhabitants in town meeting assembled, and presumably accepted by votes of the town. The reports were also published and distributed among the inhabitants. This is sufficient evidence to warrant a finding that the business was conducted with the approval of the town, and that the acts of its agents appearing in the reports were ratified. *Arlington v. Peirce*, 122 Mass. 270. The case is very different from *Wormstead v. Lynn*, 184 Mass. 425, in which the plaintiff, in an action of contract against the city, relied on a previous habit of the superintendent of streets to make certain contracts without authority, which, so far as appeared, never had been brought to the knowledge of the city council or ratified in any way by municipal action of the defendant.

In this case we have no occasion to consider whether there is a special liability founded on the use of an explosive which is intrinsically dangerous to persons and property in the vicinity who are not connected with the work. We are of opinion that the cases were properly submitted to the jury.

Judgment for the plaintiffs.

2. *For Failure to Provide for the Safety of Employees*

COLWELL v. CITY OF WATERBURY *

74 Conn. 568. 1902

ACTION by an employee of the city to recover damages for the loss of an eye, claimed to have been caused by the negligence of the defendant

in using a defective stone crusher and putting him to work upon the same.

Upon the trial it appeared that the stone crusher was owned by the defendant, and was being used by the defendant, in the town of Cheshire, ten miles from Waterbury, in crushing stone to be transported by rail to Waterbury and by teams to a street which was being macadamized, and there used in macadamizing said street. The plaintiff, it appeared, was employed by the defendant's street inspector, who had the general superintendence of this work and the care and maintenance of streets. Plaintiff was put to work on the stone crusher by the foreman, who, subject to the superintendent, had charge of the work of stone-crushing at Cheshire.

There seems to have been no evidence that the defendant ever sold the stone crushed by said machine, or used it for any other purpose than in macadamizing its streets.

The defendant requested the court to charge the jury that the defendant was not liable because performing a public, governmental duty, imposed upon it by the State. The court charged that the maintenance of streets was a governmental duty, and that if the work was being done in the performance of that duty there was no liability; but that "the crushing of stone intended to be used and subsequently used in macadamizing a street ten miles away was not work done in the care and maintenance of the street. Such work is confined to the work done on the street itself, or in bringing to the street the necessary materials and instrumentalities used in the work; it has no relation to the manufacture of material, or instrumentalities, or the use of machinery for that manufacture." There was a verdict for the plaintiff, and the defendant appealed.

By statute the city, by its common council, is given the sole and exclusive authority and control over streets; with power to lay out, repair and improve them, and to assess a reasonable part of the expense of paving, macadamizing, or improving a street, upon the persons whose property is specially benefited thereby.

Lucien F. Burpee and John P. Kellogg, for the appellant (defendant).

John O'Neill and George H. Cowell, for the appellee (plaintiff).

HALL, J. The injury to the plaintiff was caused by operating a defective stone crusher upon which he was at work. The alleged ground of liability is the negligence of the city, or that of its street inspector, in placing the plaintiff, as an employee of the city, at work upon such defective machine.

If the city or its street inspector, in operating the stone crusher, was engaged in the performance of a public governmental duty, the defendant, in the absence of any statute making it liable, is not responsible in damages to the plaintiff for the injury caused by such act of negligence, either upon the theory that the city failed to perform its duty toward an employee, viz., to provide him a reasonably safe place in which to work

or reasonably safe instrumentalities with which to work, or upon the theory that the plaintiff, if not a servant of the city, was injured by the carelessness of the defendant's agent while the latter was performing the defendant's work.

If the city was negligent in furnishing its workmen with defective machinery with which to perform a public service, it is exempt from liability for such negligence, for the reason that in all that either the city or the plaintiff did in the performance of such public duty they acted as governmental agencies, and not in the exercise of any privilege or power for the immediate benefit of the municipality; and because, while so acting, although the city paid the plaintiff for his services, the relation between them was not the ordinary one of master and servant which exists between a city and its employees in the performance of strictly municipal duties. *Jones v. New Haven*, 34 Conn. 1, 13; *Jewett v. New Haven*, 38 *id.* 368; *Daly v. New Haven*, 69 *id.* 644, 649; *Bartram v. Sharon*, 71 *id.* 686, 692.

On the other hand, if the street inspector, as an officer or agent of the city, and as the one having, by authority of the board of street commissioners and in discharge of the duties imposed upon them by the city charter, the entire care and maintenance of the streets, was guilty of negligence in the performance of a public duty, in using a defective stone crusher or in failing to provide a proper covering for it while it was in operation, the city of Waterbury is not liable for the consequences of his negligence, since the street inspector was so far a public agent that as to such acts of negligence the rule *respondet superior* does not apply to the defendant. *Judge v. Meriden*, 38 Conn. 90, 97; *Daly v. New Haven*, 69 *id.* 644, 650.

We have had occasion to state heretofore that the rule which thus exempts municipalities from liability, when they or their servants are acting in the discharge of a public duty, does not relieve them from responsibility for the negligent acts of their workmen which are not incident to and do not flow from the performance of the public work in which they are engaged, and in doing which acts such workmen are therefore not properly acting as agents of the law; nor from liability for the consequences of the particular acts which the municipality has directed to be performed, and which, from their character or the manner in which they are so ordered to be executed, will naturally work a direct injury to the property of others, or create a nuisance, or occasion a wanton injury to the property or rights of other persons. *Judd v. Hartford*, 72 Conn. 350; *Norwalk Gas Light Co. v. Norwalk*, 63 *id.* 495; *Mootry v. Danbury*, 45 *id.* 550, 556; *Weed v. Greenwich*, *id.* 170, 183; *Danbury & N. R. Co. v. Norwalk*, 37 *id.* 109, 119.

The trial court, while recognizing the rule of municipal immunity above stated, in effect instructed the jury that when the plaintiff was injured the defendant was not engaged in the performance of a governmental duty. That part of its charge was incorrect.

In doing the work of constructing and repairing its highways the city was clearly performing a governmental act. *Jones v. New Haven*, 34 Conn. 1. The acceptance by the city of a charter authorizing it to discharge such governmental duty, neither created a contract between it and the State that such duty should be performed, nor rendered the discharge of such duty the exercise of a special privilege for the non-performance or negligent performance of which the city would become liable. *Hewison v. New Haven*, 37 Conn. 475, 482; *Hill v. Boston*, 122 Mass. 344. Macadamizing its streets was one of the ways by which the city might perform its duty of maintaining and repairing its highways (*New Haven v. Whitney*, 36 Conn. 373, 376), and it was for the city to decide whether that was the best way of discharging that duty. *Hoyt v. Danbury*, 69 Conn. 341, 352; *Healey v. New Haven*, 47 *id.* 305, 314. It was within the taxing power of the legislature to provide that a reasonable part of the expense of such repairs should be borne by those whose property was especially benefited thereby (*New London v. Miller*, 60 Conn. 112, 116), and the fact that a part of such expense might be so paid did not make the duty of repairing the streets any the less a governmental one than if the entire expense were to be paid by a general city tax.

The work of breaking, by means of a stone crusher, the stone to be used in macadamizing the street, was a part of the work of macadamizing such street. It was necessary that the stone used in macadamizing should be broken into small pieces. If laborers had been employed to break the stones with hammers, upon the street to be macadamized, it would hardly be said they were not performing a part of the work of macadamizing the street. But to become part of the work of macadamizing, it is not necessary that the labor should be performed upon the street to be repaired. Part of the work of macadamizing is necessarily performed elsewhere, as the carrying of the materials to the street. . . . Whether or not the stone-crusher, either before or after the accident, had been used by the city for other purposes than in macadamizing its streets, was not decisive of the case. It was a question for the jury, whether at the time of the accident either the city, or its street inspector, or its other agents in charge of the work, were in fact engaged in operating the stone crusher for the purpose of macadamizing a city street, as claimed by the defendant. It seems to have been shown at the trial that when the plaintiff was injured the stone crusher was being operated to crush stone to be used, and which in fact was used, in macadamizing a certain street. For an injury sustained by the plaintiff under such circumstances the city has the same immunity from liability as from one suffered by its employee in operating a defective street-roller or fire engine. Municipal corporations are not liable unless made so by statute for injuries occasioned by negligence in using or failing to keep in repair the fire engines owned by them. *Dillon, Mun. Corp.* (4th ed.), p. 976, note 1; *Jewett v. New Haven*, 38 Conn. 368, 381.

A very similar case in many of its aspects to the one at bar is that of *Barney v. Lowell*, 98 Mass. 570, cited in *Jewett v. New Haven*, in which it was held that the city was not liable for an injury caused by the negligence of a teamster, engaged in carting stone from a stone crusher to repair a highway, and employed in that work by the superintendent of streets who had charge of the repairing of the streets and the crushing of the stone for that purpose.

In the case of *Hughes v. County of Monroe*, 147 N. Y. 49, it was held that the county was not liable for an injury sustained by one of its employees in operating a steam mangle in a laundry, which the servants of the defendant had failed to keep in proper repair; and in *Wild v. Patterson*, 47 N. J. L. 406, that the defendant was not liable for an injury to a member of the fire department caused by a defective brake on the steam fire engine which he was assisting in taking to a fire. In the latter case it was held that, since such employees of the corporation were mere instruments in the execution of its public duties, the fact that the plaintiff was a paid employee of the city would not create between them the ordinary relation of master and servant so as to render the city liable for its failure to keep the engine in good repair.

For the reasons given we think the trial court erred in not charging the jury substantially as requested by the defendant, and in charging that the crushing of stone, intended to be used and subsequently used in macadamizing a street, was not work done in the care and maintenance of the street.

The allegations in the complaint, of a promise by the defendant's foreman to furnish new teeth and a proper covering for the stone crusher, were, as stated in plaintiff's brief, not intended as a statement of liability upon a contract, but of facts affecting the question of contributory negligence. As bearing upon that question the court properly charged the jury, that information of such promises, if given to the inspector of streets, was sufficient information to the city. There is error and a new trial is granted.

In this opinion the other judges concurred, except HAMERSLEY, J., who dissented.

OSTRANDER v. CITY OF LANSING †

111 Mich. 693. 1897

CASE against the city for personal injuries received while employed by the city as a workman. From a judgment for plaintiff, defendant brings error.

The plaintiff was injured by the caving in of earth on the side of a trench in which he was at work, and which was being dug for a sewer.

There was evidence that the injury might have been avoided by the defendant, by properly shoring up the sides of the ditch. In defendant's brief the point is made that the construction of the sewer was the exercise of a governmental function, and that the city is therefore not liable.

Clark C. Wood, City Attorney (*Black & Dodge* of counsel), for appellant.

Cahill & Ostrander, for appellee.

MONTGOMERY, J. . . . We think the claim that the city was in the exercise of a governmental function, instead of a private municipal enterprise, is ruled by the case of *City of Detroit v. Corey*, 9 Mich. 165 (80 Am. Dec. '78). The charter of the city of Lansing contains the following provision: "The council may charge and collect annually, from persons whose premises are connected by private drains with the public sewers, such reasonable sum, not exceeding two dollars per year, as they may deem just, in proportion to the amount of drainage through such private drain." It was said of a similar power in *City of Detroit v. Corey*:

"It is to be observed that the power under which they acted, and which made that lawful which would otherwise have been unlawful, was not a power given to the city for governmental purposes, or a public municipal duty imposed on the city, as to keep its streets in repair, or the like, but a special legislative grant to the city for private purposes. The sewers of the city, like its works for supplying the city with water, are the private property of the city. They belong to the city. The corporation and its corporators, the citizens, are alone interested in them. The outside public, or people of the State at large, have no interest in them, as they have in the streets of the city, which are public highways."

It may be added that, as to the sewers constructed under the charter by the city of Lansing, they may be also a source of revenue. See, also, *Barron v. City of Detroit*, 94 Mich. 601 (34 Am. St. Rep. 366); *Baker v. City of Grand Rapids*, ante, 447. . . .

[Judgment was reversed on another ground.]

3. For Failure to Provide for the Safety of Persons Rightfully upon the Corporate Property

EASTMAN v. TOWN OF MEREDITH

36 N. H. 284. 1858

PERLEY, C. J. The following may be taken for a general statement of the case set up by the plaintiff. The town of Meredith built a town-house, to be used for holding town-meetings and other public

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purposes. The house, by the default and negligence of those who built it in behalf of the town, was so improperly constructed that the flooring gave way at the annual town-meeting in 1855, and the plaintiff, an inhabitant and legal voter, in attendance on the meeting, received a serious bodily injury. The accident and injury were caused by the defects and insufficiency of the building. [A lengthy discussion of early doctrines and decisions is omitted.]

Then, again, towns and other municipal corporations, including counties in this State, have power, for certain purposes, to hold and manage property, real and personal; and for private injuries, caused by the improper management of their property, as such, they have been held to the general liability of private corporations and natural persons that own and manage the same kind of property. *Bailey v. The Mayor, etc., of New York*, 3 Hill, 541. So far as they are the owners and managers of property, there would seem to be no sound reason for exempting them from the general maxim which requires an individual so to use his own that he shall not injure that which belongs to another. So if a town or city maintain an erection or structure which is a private nuisance, and causes a special damage, or, in the performance of an authorized act, invade any right of property, the corporation has been held liable to a civil action. *Thayer v. Boston*, 19 Pick. 511; *Akron v. McComb*, 18 Ohio, 229; *Rhodes v. Cleveland*, 10 Ohio, 159. If the defendants in the present case had laid and maintained the foundations of their town-house across a stream, and caused the water to flow back on the plaintiff's land, according to these authorities they would have been liable to an action for the damage.

The case of the plaintiff cannot be classed with any of those to which we have adverted. The question here is, whether a town is liable to the action of a citizen of the town who has suffered a special damage from neglect of the town to provide a safe place for holding the annual town-meeting. The public duty relied on is not enjoined by express provision of any statute. If such a duty exists, it is implied from the general character and design of such quasi corporations, and must depend on the general law applicable to all towns. Here is no contract, express or implied, between the State and the individual town, and no grant of any special power or privilege which can be supposed to have been voluntarily accepted by the town upon condition of performing the public duty. Towns are involuntary territorial and political divisions of the State, like counties, established for purposes of government and municipal regulation. It is chiefly through this organization of towns that the people exercise the sovereign power of government; and the plaintiff's claim is for damages which he has suffered from neglect of the town to provide him a safe place for the exercise of his public and political rights as a citizen of the town and State. . . .

We regard the present case as one of new impression. We have

heard of no earlier attempt in this State to maintain an action against a town, for a private injury suffered by a citizen of the town from neglect of the town to provide him with safe and suitable means of exercising his public rights, and we are not informed of any case in which such an action has been maintained in any other State. We believe it to have been the general understanding of the profession in this State, that an action will not lie against a town for neglect to perform a mere public duty, unless the action is given by statute. The authorities cited in support of the plaintiff's action are very distinguishable, as we think, from the present case, and there is a great weight of authority on the other side.

Our conclusion is, that this action, on the case stated to us, cannot be maintained.

OLIVER v. CITY OF WORCESTER *

102 Mass. 489. 1869

TORT, for injuries caused by falling into an excavation on the south side of the city hall, upon the public common, in Worcester. The judge reported the case.

The excavation had been dug under the direction of a committee of the city council, which had charge of making certain alterations in the city hall building. It was situated about fifteen feet from the building, and was to be the location of steam boilers for heating the building. There was evidence that plaintiff fell into the excavation in the evening, while crossing upon a path which had been used by the public for a walk for more than twenty years; and that her injury was due to carelessness in leaving the excavation unguarded. The city hall, the Old South meeting-house, and a public school-house are situated upon the common, which at present contains about nine acres and is fenced.

Before the city hall was repaired and improved as aforesaid, the city had leased a part of the basement for markets. At the time of the injury, the building, being under repair, was not occupied for any purpose. But ever since the repairs were completed the entire building has been used for city offices, and meetings of the city government, and ward-rooms, excepting that the municipal court and police court for the city have occupied a part of the second story, for which the city receives rent from the county; and the entire basement is used for a lockup and for police offices for the city police, which said rooms were prepared for these purposes at the time of the repairs aforesaid.

The judge ruled that the plaintiff could not recover, directed a verdict for the defendant, and reported the case.

G. F. Verry, for the plaintiff.

851. Park Street Nov 1 1869

W. W. Rice, for the defendants.

GRAY, J. The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public.

To render municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns and cities alike, and from the performance of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. Such is the well settled rule in actions against towns or cities for defects in highways. 5 Edw. IV. 2, pl. 24; *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 169, 187; *Mower v. Leicester*, 9 Mass. 247; *Holman v. Townsend*, 13 Met. 297; *Brady v. Lowell*, 3 Cush. 121; *Providence v. Clapp*, 17 How. 161, 167. The same rule has been held to govern an action against a town by a legal voter therein, for an injury suffered while attending a town meeting, from the want of repair in the town-house erected and maintained by the town for municipal purposes only; or by a child, attending a public school, for an injury suffered from falling into a dangerous excavation in the school-house yard, the existence of which was known to the town, and which had been dug by order of the selectmen to obtain gravel for the repair of the highways of the town and to make a regular slope from the nearest highway to the school-house. *Eastman v. Meredith*, 36 N. H. 284; *Bigelow v. Randolph*, 14 Gray, 541.

But this rule does not exempt towns and cities from the liability to which other corporations are subject, for negligence in managing or dealing with property or rights held by them for their own advantage or emolument. Thus where a special charter, accepted by a city or town, or granted at its request, requires it to construct public works, and enables it to assess the expense thereon upon those immediately benefited thereby, or to derive benefit in its own corporate capacity from the use thereof, by way of tolls or otherwise, the city or town is liable, as any other corporation would be, for any injury done to any person in the negligent exercise of the powers so conferred. *Henley v. Lyme*, 5 Bing. 91, s. c. 3 B. & Ad. 77, 1 Scott, 29, 1 Bing. N. C. 222, 2 Cl. & Fin. 331, 8 Bligh (N. S.), 690; *Weet v. Brockport*, 16 N. Y. 161, note; *Weightman v. Washington*, 1 Black, 39; *Nebraska City v. Campbell*, 2 Black, 590. Perley, C. J., in *Eastman v. Meredith*, 36 N. H. 289-294; Metcalf, J., in *Bigelow v. Randolph*, 14 Gray, 543; *Child v. Boston*, 4 Allen, 41, 51.

So where a municipal corporation holds or deals with property as its own, not for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as a

private owner might, it is liable to the same extent as he would be for the negligent management thereof to the injury of others. [The court here referred to various cases.]

In the case at bar, it appears from the report of the learned judge who presided at the second trial, that the evidence tended to show that the plaintiff, while walking, using due care, upon a footpath which had been used by the public for more than twenty years, and had been laid out and graded from time to time and prepared and cared for by the town and city of Worcester, and was within the public common which had been used by the inhabitants of the town for a much longer period, fell into a deep excavation, made by direction of a joint committee of the city council, under the authority and at the expense of the city, in the course of repairing and improving a building standing within the common, used by the city principally for municipal purposes, but a substantial portion of which, both before and after the time of the accident, the city leased, and received rent for, either from private persons or from the county, and which was therefore held and used by the city, not for municipal purposes exclusively, but in considerable part as a source of revenue; and that this excavation was within a few feet of the building, and was carelessly left unguarded. If, in the course of repairing this building, the servants and agents of the city, acting by its authority, negligently suffered the adjoining land within its control to be in a dangerous condition, without proper notice to persons exposed to the danger, coming there rightfully under an implied invitation and license, and using due care, the city was responsible, as any private owner would be, for an injury sustained by such a person by reason of such negligence; and it is immaterial whether the title in the land was or was not in the defendant. *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216. The case should therefore have been submitted to the jury.

New trial ordered.

4. *For a Positive Trespass on, Appropriation of, or Nuisance to, Private Property*

SHELDON v. VILLAGE OF KALAMAZOO

24 Mich. 383. 1872

ERROR to Kalamazoo circuit.

CAMPBELL, J. The present controversy arises out of a certain action of the marshal of the village of Kalamazoo, in pursuance of a resolution of the village board, in entering upon the close of the plaintiff and throwing down his fences, on a claim that he was occupying part of a village street.

736 *Michigan*

737 *2d 3d 4d*

738 *Common*

739 *Michigan*

The plaintiff proved title to the land, and offered to show a resolution of the president and trustees of the village duly assembled, whereby the committee on streets were directed to notify all persons on the line of the Olmstead road, so called, who had encroached upon that road within the village limits, by the erection of fences or otherwise, to remove their fences and cease to encroach on it, and on failure of any one to comply, then the committee were directed to notify the marshal forthwith to remove the fences, so that said encroachments should cease to exist. He further offered to show that his land adjoined said road and his fence stood on the line, but that defendants claimed the fence was in the road and encroached on it; that thereupon they passed said resolution, and in pursuance thereof the street committee notified the plaintiff to remove the fence, and set it back ten or twelve feet on his land, which he refused to do; that thereupon the committee directed the marshal to tear down and remove the fence, and threatened to remove him from office unless he did so; and he thereupon complied with their directions and removed the fence.

The court refused to allow any evidence to be received, basing the refusal on the ground (as we infer from the objections) that the president and trustees acted in the capacity of public officers and not municipal agents, and that the corporation is not liable for their acts in the premises.

The injurious act complained of is not a public grievance, but is a wrong done to a private person. It is not a wrong arising from neglect, but is the direct operation of a willful trespass. The case is therefore freed from all those complications which attend the discussion of questions of liability for neglects and for public grievances. And as the whole control over the subject of streets in the village of Kalamazoo is in the corporate authorities, there is no room for the consideration of those difficulties which arise where corporate action is aimed at matters entirely foreign to the concerns of the municipality.

The doctrine is entirely untenable that there can be no municipal liability for unlawful acts done by municipal authorities to the prejudice of private parties. In this respect, public corporations are as distinctly legal persons as private corporations. There are officers who are corporation agents, and there are municipal officers whose duties are independent of agency and with distinct liabilities. But when the act done is in law a corporate act, there is no ground upon reason or authority for holding that if there is any legal liability at all arising out of it, the corporation may not be answerable. There is no conflict whatever in the authorities on this head. The only disagreement is concerning corporate responsibility in cases of alleged neglect of duty, and concerning the bounds of what may be termed their legislative discretion, as distinguished from their other action. To hold that positive wrongs must in all cases be considered as purely individual and not corporate acts, would be a novelty in jurisprudence.

Although not subject like corporations to the jurisdiction of courts, it has always been understood that even states and nations may be held responsible for the wrongs of their authorized agents, and the whole system of public law rests on this assumption. The idea, therefore, that a corporate body has a discretionary power to do wrong and not suffer for it, is not in harmony with any safe principle. There may be certain cases where is, of necessity, a final discretion; but there can be no absolute discretionary power over private persons or property. They are assured by the law of the land against any improper interference, and no public authority exists which can authorize their immunity to be taken away.

The act complained of here is a forcible taking of private lands for public use, without either compensation, or any steps under the forms of law to determine the necessity of taking them. The only justification of the act must be found in showing them to belong already to a lawfully existing public highway. This is a question of fact and of private right, and the claimant of the land cannot be deprived, by any power in this State, from having his rights passed upon by the legal tribunals.

There are decisions which hold that when a corporate board has power to establish grades and other public works, merely incidental inconveniences will not authorize their honestly exercised discretion to be disregarded. How far this doctrine can be carried we have no occasion now to consider. The incidental damage which may arise from the vicinity of public improvements, and the imperfections of their plan, is very different from the actual invasion of private possessions. There is no case where the actual taking of private property is *damnum absque injuria*. Compensation is a constitutional condition of such taking, and it can only be lawful when the necessity of the taking, as well as the measure of compensation, has been determined in a legal way. If a municipal board can finally determine that a highway already exists over private lands, there can be no security whatever against unlawful seizures. It would not only allow interested judges to decide, but it would cut off all appeal from their decisions. In all the proceedings for taking land for streets, in cities and villages, the municipality is regarded as a party litigant: *People v. Brighton*, 20 Mich. R. 57. When the local authorities decide that they desire the way established, they then become petitioners and movers, just as railroad companies do where land is needed for their purposes. The contest is between the city or village and the private citizen, and when the damages are determined and the land is to be used, the former is responsible for their payment. There would be no more propriety in allowing a corporation to determine for itself that it already owned the way, than in permitting a private person to decide his own action of ejectment.

If the property in dispute is not subject to the public easement

asserted, then the village of Kalamazoo has taken possession of property it could not lawfully appropriate without a legal condemnation. There is no authority that we can find which holds such an invasion of private lands not to be an act of the corporation, and none which would exempt the corporation from liability to an action for the wrong. The directions to the marshal came from the authority of the village board, acting as a board, and not as individuals, and all that was done under the resolution was in the course of agency, and not in the distinct exercise of discretionary powers over which the board had no control. None of the persons acting possessed any such discretionary jurisdiction in relation to protecting public ways. The whole control, as already suggested, is given by the charter to the corporate board, and all parties acted on that theory. The principle of liability is, therefore, well established on a line of authority which has not been questioned: *Thayer v. Boston*, 19 Pick. R. 511; *Clark v. Washington*, 12 Wheat. R. 40; *Allen v. Decatur*, 23 Ill. 332; *Lee v. Sandy Hill*, 40 N. Y. 442; *Nichols v. Boston*, 98 Mass. R. 39; *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 465; *Detroit v. Corey*, 9 Mich. R. 165; *Pennoyer v. Saginaw City*, 8 Mich. R. 534. . . .

We think the judgments should be reversed with costs, and a new trial granted.

ASHLEY v. CITY OF PORT HURON

35 Mich. 296. 1877

COOLEY, C. J. The action in this case was instituted to recover damages for an injury caused to the house of the plaintiff by the cutting of a sewer under the direction of the city authorities, and under city legislation, the validity of which is not disputed. The necessary result of cutting the sewer, the plaintiff claims, was, to collect and throw large quantities of water upon his premises which otherwise would not have flowed upon them; and it is for an injury thereby caused that he sues. The evidence offered on the part of the plaintiff tended to establish the case he declared upon, but the court instructed the jury that though they should find the facts to be as the plaintiff claimed, they must still return a verdict for the defendant. The ground of this decision, as we understand it, was, that the city, in ordering the construction of the sewer and in constructing it, was acting in the exercise of its legislative and discretionary authority, and was consequently exempt from any liability to persons who might happen to be injured. That is the ground that is assumed by counsel for the city in this court, and it is supposed to be the ground on which the case was decided in the court below. . . .

It is very manifest from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other. *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Arimond v. Green Bay, etc., Co.* 31 Wis. 316; *Eaton v. B. C. & M. R. R. Co.*, 51 N. H. 504.

A like excess of jurisdiction appears when in the exercise of its powers a municipal corporation creates a nuisance to the injury of an individual. The doctrine of liability in such cases is familiar and was acted upon in *Pennoyer v. Saginaw*, 8 Mich. 534. . . .

Judgment reversed. New trial ordered.

MILES v. CITY OF WORCESTER *

154 Mass. 511. 1891

TORT for damages occasioned by an encroachment upon plaintiff's land of a retaining wall, which had been built by the city in 1871 on the dividing line between the plaintiff's land and a lot owned by the city.

There was evidence that the defendant had acquired the lot and had always used it for the purposes of a public high school; that the wall since it was built had been pressed out of position by reason of the weight of the filling behind it or by the action of surface water or frost, so that for nearly or quite a foot at the bottom it had bulged out and come upon the plaintiff's land; and that this bulging out of the wall had increased within six years before the date of the writ, and had gradually affected the plaintiff's estate.

The judge instructed the jury, in substance, that if the plaintiff by reason of the encroachment of the wall had been kept out of possession and occupation of a part of this land, and if within six years before the date of the writ the city had allowed or suffered the wall to be pushed and crowded upon the plaintiff's land, creating a nuisance thereto, causing him special and peculiar damage, then there was a liability in an action of tort as for a nuisance, no other objection existing to a recovery.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

F. P. Goulding, for the defendants.

W. S. B. Hopkins (*F. B. Smith* with him), for the plaintiff.

ALLEN, J. It is obvious that the defendant's wall, in its present position upon the plaintiff's land, must be deemed an actionable nuisance, unless the defendant can claim exemption from responsibility on some special ground. *Codman v. Evans*, 7 Allen, 431; *Nichols v. Boston*, 98 Mass. 39, 43; *Fay v. Prentice*, 1 C. B. 828. The defendant suggests that it is not liable, because the wall was built and maintained solely for the public use, and with the sole view to the general benefit and under the requirement of general laws; and that the case cannot be distinguished in principle from the line of cases beginning with *Hill v. Boston*, 122 Mass. 344, and ending with *Howard v. Worcester*, 153 Mass. 426. We are not aware, however, that it has ever been held that a private nuisance to property can be justified or excused on that ground. The verdict shows a continuous occupation of the plaintiff's land by the encroachment of the defendant's wall. The question of negligence in the building of the wall is not material. The erection was completed, and was accepted by the defendant, and is now in the defendant's sole charge; and if it is a nuisance, the defendant is responsible. *Staple v. Spring*, 10 Mass. 72, 74; *Nichols v. Boston*, 98 Mass. 39. Such an occupation of the plaintiff's land cannot be excused for the reasons assigned. A city cannot enlarge its school grounds by taking in the land of an adjoining owner by means of a wall or fence. The public use and the general benefit will not justify such a nuisance to the property of another. If more land is needed, it must be taken in the regular way, and compensation paid, but if, by the action of the elements or otherwise, without the plaintiff's fault, the defendant's wall comes upon the plaintiff's land and continues there, it becomes a nuisance for which the defendant is responsible; and so are the authorities. *Gorham v. Gross*, 125 Mass. 232, 239; *Khron v. Brock*, 144 Mass. 516; *Eastman v. Meredith*, 36 N. H. 284, 296; *Hay v. Cohoes Co.*, 2 Comst. 159; *Tremain v. Cohoes Co.*, 2 Comst. 163; *Weet v. Brockport*, 16 N. Y. 161, 172, note; *St. Peter v. Denison*, 58 N. Y. 416, 421; *Mayor & City Council of Cumberland v. Willison*, 50 Md. 138; *Harper v. Milwaukee*, 30 Wis. 365; *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 181; *Dillon, Mun. Corp.*, § 985.

The case is distinguishable from *Middlesex Co. v. McCue*, 149 Mass. 103, where soil from the defendant's land upon a hillside was washed into the plaintiff's mill-pond by the rains, when the defendant had built no artificial structure, and had done nothing more than to cultivate his land in the ordinary way.

Exceptions overruled.

MORTON v. MAYOR, ETC., OF NEW YORK *

140 N. Y. 207. 1893

APPEAL from judgment of the General Term of the Supreme Court entered upon an order which reversed a judgment in favor of defendant entered upon a decision of the court on trial at Circuit.

Action to recover damages for maintaining a pumping station near certain brick houses owned by the plaintiff. The injury of which the plaintiff complained was that, by reason of the operation of the pumps and machinery in the station, the noise and vibration therefrom greatly damaged the plaintiff's houses, next adjoining, rendering them untenable, or at least greatly diminishing their rental value.

The pumping station was established in connection with the Croton water system, to supply water to high places in the city. It was erected under an act of 1878, which empowered the city authorities to raise and spend funds in extending the pipes and enlarging the distribution of the water; and "in laying mains and erecting or constructing such structures and fixtures as the said Commissioner of Public Works may deem necessary to deliver said water at high levels and in greater quantities, an additional sum not exceeding one million five hundred thousand dollars." The structure was placed on land previously owned by the city.

Charles J. Blandy, for appellant.

B. F. Tracy, for respondent.

O'BRIEN, J. . . . There is no complaint of negligent management on the part of the municipal authorities, but the plaintiff's contention is that he was entitled to the use and enjoyment of the property which he owned free from such annoyance or loss. On the other hand the defendant insists that it is not liable for the results of the injury for the reason that it acted in the exercise of powers for public purposes conferred by express legislative authority. These positions assumed by the respective parties sufficiently disclose the nature of the legal question involved. The defendant's position was sustained by the trial court, and the complaint dismissed, but the General Term has reversed the judgment.

The defendant, by the exercise of the power of eminent domain,

could have taken such portion of the adjoining property as would enable it to conduct its operations without damage to what remained, and the owner would then be entitled to compensation. It may be a question worthy of consideration whether upon the facts disclosed the defendant's acts do not virtually amount to a taking without any compensation to the extent of the damage caused, but a consideration of this feature of the case is rendered unnecessary by recent decisions of this court which, when applied to the facts disclosed by the record, fully sustain the view taken by the learned General Term. These cases have grafted upon the principle contended for in behalf of the defendant (that legal liability in damages cannot result from acts done by a corporation in the performance of a public duty by express legislative authority, resulting in consequential injury to others, and which, as between individuals would be regarded as a nuisance), an important limitation. It is that the authority which will shelter an actual nuisance must be express or a clear and unquestionable implication from powers conferred, certain and unambiguous, and such as to show that the legislature must have intended and contemplated the doing of the very act in question. *Hill v. Mayor, etc.*, 139 N. Y. 495; *Bohan v. Port Jervis Gas Light Co.*, 122 *id.* 18; *Cogswell v. N. Y., N. H. & Hartf. R. R. Co.*, 103 *id.* 10.

The authorities cited show that this qualification of the general doctrine is founded in reason and justice, and that it is not by any means a new principle. It only remains to point out its application to this case. The legislature undoubtedly authorized the defendant to construct a building, and to place in it the necessary machinery to accomplish the purpose in view. But that is not the act complained of, or which produced the injury to the plaintiff's property. The wrong consisted in placing the building and machinery so near to the adjoining property as to injuriously affect it by the noise and vibration. The city has a right to build upon its own land, but there was nothing in the statute that required it to place the structure where it did. It could perform every duty imposed by the statute by building the pumping station at such distance from the adjoining houses as to avoid the results of which the plaintiff justly complains. If it was not possible or practicable to do that upon the land that the defendant owned, then more could have been acquired for the purpose. The legislature did not select the place for the station, but the defendant did. A general authority to raise and expend money for the purpose of extending and enlarging the supply of water, and erecting the necessary structures and machinery for that purpose, is neither an express nor implied authority to construct a pumping station which adjoins the walls of another house or block of houses in such manner as to render them untenable by the noise and vibration. It was entirely possible to execute the statute without invading the property rights of others. General powers for the accomplishment of a general purpose were conferred upon the defendant, but no express or

implied power or authority was conferred to do the very act complained of, nor can it be said that the legislature contemplated it. It is quite likely that all the power intended to be conferred by the statute was to enable the city to raise and expend the money for the purpose indicated. Aside from this power, the city probably could, if it had the means, build the station under existing law, and without any additional legislation. But, however that may be, it cannot be said that the legislature contemplated the selection of such a place for the station that the operation of the pumps and machinery would inevitably expose private property to destruction or injury. The language of Chief Justice Marshall in *U. S. v. Fisher* (2 Cranch, 358) is applicable: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects."

It is plain, we think, that the specific act of the defendant which resulted in the injury is not within the express words of the statute, or any necessary implication.

The order appealed from, should, therefore, be affirmed, and judgment absolute ordered for the plaintiff, with costs.

JOHNSON v. CITY OF SOMERVILLE †

195 Mass. 370. 1907

LORING, J. This case comes up on a report after a verdict for the plaintiff.

What the plaintiff complained of in this action was that his cellar was flooded because of ashes being dumped into a water course on the next lot of land owned by the heirs of Mary C. Gurney. The jury must be taken to have found that there was a water course on the next lot, and that the plaintiff's cellar was flooded by reason of the dumping of ashes into such water course. The question left open under the report is whether on any aspect of the evidence the jury were warranted in finding that the defendant city was liable.

It appeared that the water course in question was a brook which ran dry in summer. There was evidence that when it ran dry a mud hole of stagnant water was left on the premises in or near its course. The record of the board of health of the defendant city showed that in 1893 that board voted that the brook "must be drained to the sewer," and in 1896 the board passed the same vote with the addition that the work should be done by the heirs of Mary C. Gurney.

At the trial the plaintiff testified that the deposit of ashes began in 1896 and continued for four years; that he knew of the deposits and never made any attempt to prevent them. . . .

If the filling here complained of was not found by the jury to have been made under an order of the board of health, they must have found that it was made by Huse of his own motion because he found it convenient to dump there the ashes collected by him, as an employee of the city, from the residences in that neighborhood. The way and the only way in which the plaintiff has made out that the act of Huse (and those acting with him) was in law the act of the defendant city was in the proof that what Huse did was done in the course of his employment by the defendant city in removing ashes from residences in the neighborhood. . . .

This brings us to the question of the defendant's liability in the case at bar if the jury found that Huse in removing the ashes was in the service of the city and not of the board of health acting as such.

If the plaintiff had been run over and injured through the negligence of a driver of one of the defendant's carts, while it was being used in the removal of the ashes here in question, he could not have recovered damages for the injury from the defendant city. That is established by the recent case of *Haley v. Boston*, 191 Mass. 291.

The ground on which it was contended that the city is liable here is that the rule applied in *Haley v. Boston* is confined to cases of negligence and does not apply to injuries caused by intentional acts, that is to say, by acts which if done on the plaintiff's land in place of being done on land not owned by the plaintiff would be ground for an action of trespass *quare clausum fregit*, as distinguished from an action on the case.

In the opinion of a majority of the court no distinction can be made between negligent and intentional acts. [The court here reviewed or cited many Massachusetts decisions.]

In *Kelly v. Boston*, 186 Mass. 165, the plaintiff sought to make the defendant city liable for injury to an awning on his store caused by snow being thrown from the roof of the city hall. It was held that the rule here in question applied, and that the plaintiff could not recover. In *Barry v. Smith*, 191 Mass. 78, it was held that by reason of this same rule the members of a board of health were not liable for acts of trespass committed by men employed under them in conducting a hospital. . . .

In the first place the rule now under consideration has nothing to do with mere nonfeasance. It is settled that for non-performance of a public duty resulting in damage to an individual, no action lies against the municipal body or against the person upon whom the public duty in question is put. *Riddle v. Proprietors of Locks & Canals*, 7 Mass. 169; *Mower v. Leicester*, 9 Mass. 247; *Russell v. Men of Devon*, 2 T. R. 667. See also *Hill v. Boston*, 122 Mass. 344, 351, where the cases are collected.

Again the rule with which we are dealing has nothing to do with the liability of a city or town, nor has it to do with the liability of a public

officer, for the tortious acts done by the city or town itself or by the public officer in person. Where the tortious act complained of is done in pursuance of a vote of the inhabitants of the town in town meeting (as was the case in *Lawrence v. Fairhaven*, 5 Gray, 110) or in pursuance of a vote of the city council of a city (as was the case in *Perry v. Worcester*, 6 Gray, 544), the town and city respectively are liable. The liability of a city under those circumstances was recognized in terms by Field, J., in *Manners v. Haverhill*, 135 Mass. 165, 171. To the same effect see *Edgerly v. Concord*, 62 N. H. 8, 19. So where the tortious act is done by the public officer personally, or by some one in his presence and under his personal direction (as to which see *Elder v. Bemis*, 2 Met. 599), the public officer is personally liable. This was decided in *Moynihan v. Todd*, 188 Mass. 310, and in the earlier case of *Elder v. Bemis*, 2 Met. 599. It was afterwards laid down as the rule to be followed at the new trial ordered in *Barry v. Smith*, 191 Mass. 78, 91.

Lastly, the rule with which we are dealing has nothing to do with the liability of a municipal body as owner of land or of a building. Its liability as owner of land or of a building is the same as that of a natural person. *Miles v. Worcester*, 154 Mass. 511. See also in this connection Field, J., in *Manners v. Haverhill*, 135 Mass. 165, 171. To the same effect see *Eastman v. Meredith*, 36 N. H. 284, 295, 296.

The rule we are dealing with here has to do with the liability of a municipal body (whether a city or a town), and with the liability of a public officer, for damages caused by the tortious acts of misfeasance done by employees in the course of their employment. . . .

The question, and the only question in such a case, is whether the relation of master and servant exists between the employee and the municipal body or between the employee and the public officer accordingly as one or the other is the defendant in the action in question. [An exhaustive collection and discussion of Massachusetts decisions has been omitted.]

In *Lawrence v. Fairhaven*, 5 Gray, 110, the defendant town by vote of the town, and in *Perry v. Worcester*, 6 Gray, 544, the defendant city by vote of the city council, directed the act to be done for which it was held to be liable as an invasion of the plaintiff's right of property, as we already have pointed out. . . .

To conclude: The dumping of the ashes complained of in the case at bar was not done on the land of the defendant but upon land of the heirs of Mary C. Gurney. It was not done in pursuance of an order of the defendant city itself, that is, of the city council. It was done by the city's superintendent in the performance of a public duty from which the city derived no private benefit. *Haley v. Boston*, 191 Mass. 291. In the opinion of a majority of the court the act of dumping these ashes on the Gurney land was not in contemplation of law the act of the defendant city, and for that reason it is not liable for it.

The maintenance of the nuisance caused by the ashes remaining where

they were dumped would appear to be the act of the owners of the Gurney estate. It is not the act of the defendant city.

Judgment for the defendant.

5. *For Permitting a Public Nuisance*

SPEIR v. CITY OF BROOKLYN *

139 N. Y. 6. 1893

APPEAL from judgment of the General Term of the City Court of Brooklyn entered upon an order which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Action to recover damages for injuries to plaintiff's premises in the city of Brooklyn, caused by the explosion of a rocket. Under the city ordinances, one Amatrano obtained a permit from the mayor's office, for the discharge of fireworks at the corner of Montague and Clinton streets. Under this permit, there was a display of fireworks, in the streets, at the place mentioned, on the occasion of a political meeting. During the display one of the rockets entered the window of plaintiff's house, within sixty or eighty feet from the point where it was discharged, occasioning the damage for which the action is brought. It had been customary for the mayor to grant similar permits under the assumed authority of the ordinance referred to. The city ordinance forbade, under penalty, the discharging of fireworks, except by order of the common council, or on July 4, or when "authorized by a permit from the mayor," or, in another provision, when "allowed under permit from the mayor," etc.

Further facts are stated in the opinion.

Almet F. Jenks, for appellant.

William C. De Witt, for respondent.

ANDREWS, C. J. The finding of the trial judge that the use of the street for the discharge of fireworks constituted a public nuisance is amply justified in view of the circumstances. It has been decided in some cases that the discharge of fireworks in the streets of a city or village is a nuisance *per se*, and subjects persons engaged in the transaction to responsibility for any injury to person or property resulting therefrom. *Jenne v. Sutton*, 43 N. J. L. 257; *Conklin v. Thompson*, 29 Barb. 218. It may be doubted whether the doctrine in its full breadth can be maintained. The practice of making the display of fireworks a part of the entertainment furnished by municipalities on occasions of the celebration of holidays or the commemoration of important public

events, is almost universal in cities and villages, and we are not prepared to say that this may not be done, and that streets and public places may not be used for this purpose, under the supervision of municipal authorities, due care being used both as to the place selected, and in the management of the display, without subjecting the municipality to the charge of sanctioning a nuisance and the responsibility of wrongdoers.

But the circumstances in the present case do not take the transaction in question out of the category of nuisances, or relieve the parties who conducted or promoted the affair from liability for the injury occasioned. The discharge of fireworks in a city under any circumstances is attended with danger. In the present case the danger was greatly enhanced by the location. It was at the junction of two narrow streets of a large city, completely built upon, and where any misadventure in managing the discharge would be likely to result in injury to persons or property. The display was of considerable magnitude, and the explosives, especially the rockets, were heavily charged and, when exploded, were carried with immense velocity. It was managed by private persons under no official responsibility, and no municipal or public interest was concerned. Under the circumstances, in view of the place, the danger involved, and the occasion, the transaction was an unreasonable, unwarranted, and unlawful use of the streets, exposing persons and property to injury, and was properly found to constitute a public nuisance.

The judgment below adjudges that the city of Brooklyn is liable for the injury sustained by the plaintiff and this is the only question in the case. That a municipal corporation may commit an actionable wrong and become liable for a tort is now beyond dispute. If the city directed or authorized the discharge of the fireworks which resulted in the injury complained of, it is, we think, liable. The inquiry is whether the city of Brooklyn did anything which as to this plaintiff placed it in the attitude of a principal in carrying on the display. The mayor of the city, its chief executive officer, expressly authorized it, assuming to act under an ordinance of the common council. In so doing and in construing the ordinance as authorizing him to grant a permit to private persons to use the public streets for the discharge of fireworks, he was following the practice which had long prevailed, and so far as appears no question had been raised that such permits were not within the ordinance. The permit when given and communicated to the police was understood as preventing any police interference with the act permitted, and it had that effect in the case in question. The city had power to prohibit or regulate the use of fireworks within the city and to enact ordinances upon the subject. The ordinances passed were not *ultra vires* in the sense that it was not within the power or authority of the corporation to act in reference to the subject under any circumstances. (See *Dillon on Mun. Corp.*, par. 963, *et seq.*) . . . (See *Cohen v. Mayor, etc.*, 113 N. Y. 532.) But it is claimed that the ordinance did not by its

true construction authorize the mayor to grant permits to use the streets for the discharge of fireworks. . . . The ordinance was, in fact, the reason for the granting of the permit in this case. We think that as to the plaintiff, who has suffered the injury, the city is bound by the construction of the ordinance placed upon it by the mayor, and upon which for years the mayor had acted.

We think the judgment is sustainable and it should, therefore, be affirmed.

All concur.

Judgment affirmed.

LINCOLN v. CITY OF BOSTON *

148 Mass. 578. 1889

TORT. The Superior Court sustained a demurrer; and the plaintiff appealed. The declaration alleges facts in substance as follows: While the plaintiff, using due care, was driving in a buggy on Charles Street, in Boston, adjacent to the Common, his horse was frightened and caused to run away and injure plaintiff, by the firing of cannon on the Common one hundred feet distant from the street. The cannon belonged to a battery of the State militia, and had been fired by them under a permit or license granted by the mayor in pursuance of the following city ordinance: "No cannon or artillery shall be fired by the militia or others upon the Common or other public grounds, unless such firing is authorized by the city council, the mayor, or the commander in chief of the militia of the Commonwealth." The plaintiff avers that the Common is a tract of land owned by the defendant, over which it has full control; and that the firing of the cannon thereon was a public nuisance.

W. K. Richardson (J. T. Wheelwright with him), for the plaintiff.

A. J. Bailey, for the defendant.

HOLMES, J. We shall not enter upon the discussion to which we were invited by the arguments, as to whether a private land owner would be liable to travelers upon a highway for the noise caused by the firing of a cannon three times upon his land by his license. The case of *White v. Jameson*, L. R. 18 Eq. 303, assuming that we should follow it, does not go to the extent of holding a landowner liable for a transitory act of a third person, the scope of which cannot be enlarged by calling it a public nuisance, and which has in it no element of continuing use of the real estate. See *Butterfield v. Boston*, ante, p. 544; *Commonwealth v. Patterson*, 138 Mass. 498, 500. But we express no opinion whether the principle of *White v. Jameson*, or of *Jackman v. Arlington Mills*, 137 Mass. 277, *Dalay v. Savage*, 145 Mass. 38, and

the cases cited in *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, would extend to the one supposed, because, if it would, we are of opinion that a different principle governs the liability of the city of Boston for the firing of cannon on the Common under a license granted in pursuance of the ordinance set out in the declaration. Revised Ordinances of 1885, ch. 42, par. 14.

The city is alleged to own the Common. But it appears by statutes and decisions, of which we are bound to take notice, that its rights, even at common law, hardly extend beyond a technical title, without the usual incidents of title, and it is equally apparent that the license which it gave was not given by it as an act of ownership, but as an act of municipal government.

"The city holds the Common for the public benefit, and not for its emolument, or as a source of revenue." The use of it is dedicated to and belongs to the public. *Steele v. Boston*, 128 Mass. 583; *Veale v. Boston*, 135 Mass. 187; *Abbott v. Cottage City*, 143 Mass. 521. And the legislature has regulated the use very strictly. The city cannot let or sell the Common. St. 1854, ch. 448, par. 39. It cannot build upon it except within the narrowest limits. Pub. Sts. ch. 54, par. 16; ch. 27, par. 50. See St. 1859, ch. 210, par. 3. It cannot lay out ways over it. Pub. Sts. ch. 54, par. 13. Conversely, the city is not bound to keep it in safe condition, and is not answerable for defects in the paths which cross it. *Steele v. Boston*, 128 Mass. 583; *Veale v. Boston*, 135 Mass. 187. See, also, *Oliver v. Worcester*, 102 Mass. 489; *Clark v. Waltham*, 128 Mass. 567.

These considerations make plainer what is very plain without them, that the ordinance set out in the declaration is not the exercise of an owner's authority over his property, but is a police regulation of the use of a public place by the public, made by the city under its power to make needful and salutary by-laws, without regard to the accidental ownership of the fee. St. 1854, ch. 448, par. 35. [Citations omitted.] Like the ordinance discussed in *Commonwealth v. Davis*, its purpose is prohibitory, and the license which it implicitly authorizes (Revised Ordinances of 1885, ch. 1, par. 7) is merely a removal of the prohibition, and of the liability to a penalty which otherwise would be incurred. Revised Ordinances of 1885, ch. 1., par. 5. It makes no difference whether the license is given by the mayor or by the commander in chief of the militia. See St. 1887, ch. 411, par. 90, 108, 109. In either case, the license is not a permission granted by the agents of the owner, but an adjudication of an exception to a quasi statutory rule, made by a person who for that purpose is not the owner's agent. *A fortiori*, the person who fires the cannon is not the city's agent or servant, and the firing is not the city's act.

The case, then, is simply that the city has failed to prohibit by legislation the firing of cannon in a public park, or has given its legislative sanction on certain conditions. It has no private interest in

the matter, and there is no statute giving an action for such a cause. *Clark v. Waltham*, 128 Mass. 567, 570, and cases *supra*. See *Hutchinson v. Concord*, 41 Vt. 271, 274; *Tindley v. Salem*, 137 Mass. 171. Annoying, and even dangerous, as such firing may be, an adjoining householder could not maintain an action against the city; and the plaintiff stands no better than an adjoining owner would. We do not understand that he seeks to charge the city for a breach of its statutory duty with regard to highways. With regard to that, however it may be as to the duty of landowners, it would be enough to say that the act of the person who fired the cannon was the proximate or at least a concurring cause, and that he was not a servant of the city; *Kidder v. Dunstable*, 7 Gray, 104; or more shortly still, that noises outside the limits of the highway amounting to a public nuisance are not a statutory defect in the way. *Hixon v. Lowell*, 13 Gray, 59, 63; *Keith v. Easton*, 2 Allen, 552, 555; *Bemis v. Arlington*, 114 Mass. 507; *Cook v. Montague*, 115 Mass. 571. For these reasons, without considering other defenses, the demurrer must be sustained, and the judgment must be for the defendant.

Perhaps it will save future litigation if we go one step further, and intimate that, as the subject matter was within the city's authority to regulate by by-law, and as the by-law, so far as appears, is reasonable, those who act under it are justified in doing what we all know extra-judicially to have been done upon the Common time out of mind.

Judgment affirmed.

6. For Failure to Furnish a Public Service or Protection

MILLS *et al.* v. CITY OF BROOKLYN *

32 N. Y. 489. 1865

ACTION to recover damages for injuries to plaintiffs' premises alleged to have been caused by the insufficiency of a public sewer.

The complaint set forth that the plaintiffs were the owners of a lot, with a brick dwelling-house thereon, situate at the northwest corner of Franklin and Putnam avenues, in the city of Brooklyn; that the city corporation had, by law, the care of the streets and avenues and the control of the widening, sewerage, and draining thereof; "that the defendant, etc., negligently and unskillfully built, provided, and established sewers at the corner of Franklin and Putnam avenues; that said sewers were, and always had been, insufficient to conduct and carry away properly the water that was brought to said corner by the grade of Putnam and Franklin avenues, and the streets and avenues

thereto adjacent; and that said sewers were so negligently and unskillfully built, that they failed to perform the office for which they were constructed." It was then averred, that by reason of the premises, the plaintiffs' lot and house had been repeatedly flooded with water, causing the walls to settle and crack, and the building to be otherwise greatly injured. The answer denied the averments of the complaint.

It appeared on the trial that the plaintiffs' lot in question was on low ground, forming a natural basin into which the surface water ran from all directions; prior to the paving of the streets, however, it was absorbed by the earth. The grade of Franklin and Putnam avenues was higher than the plaintiffs' lot. In March and August, 1861, heavy rain-storms occurred, and the plaintiffs' premises were inundated; and the walls of their house thereby injured; the house was built in 1860. Prior to the first storm, there was a sewer for carrying off the water under the sidewalk; and in the month of May following, the water commissioners laid down a pipe-drain earthen sewer, in the street, about twelve inches in diameter; but it proved insufficient, on the occurrence of the second storm, to carry off the water. Other facts are stated in the opinion of the court.

At the close of the testimony, the defendants' counsel moved for a dismissal of the complaint, on the ground that no cause of action had been shown. The motion, however, was denied, and an exception taken.

The jury rendered a verdict for the plaintiffs. Defendant appeals.

Schumaker, for the appellants.

Dean, for the respondents.

DENIO, C. J. . . . The grievance of which the plaintiffs complain, is, that sufficient sewerage to carry off the surface water from their lot and house has not been provided. A sewer of a certain capacity was built, but it was insufficient to carry off all the water which came down in a rain-storm, and the plaintiffs' premises were, to a certain extent, unprotected. Their condition was certainly no worse than it would have been, if no sewer at all had been constructed. So far as the one laid down operated, it relieved the plaintiffs' lot; but the relief was not adequate. If the defendants would have been liable, if they had done nothing, they are, of course, liable for the insufficient character of the work which was constructed.

But it is not the law, that a municipal corporation is responsible, in a private action, for not providing sufficient sewerage for every, or for any, part of the city or village. The duty of draining the streets and avenues of a city or village is one requiring the exercise of deliberation, judgment, and discretion. It cannot, in the nature of things, be so executed, that in every single moment, every square foot of the surface shall be perfectly protected against the consequence of water falling from the clouds upon it. This duty is not, in a technical sense, a judicial one, for it does not concern the administration of justice

between citizens; but it is of a judicial nature, for it requires, as I have said, the same qualities of deliberation and judgment. It admits of a choice of means, and the determination of the order of time, in which improvements shall be made. It involves, also, a variety of prudential considerations relating to the burdens which may be discretely imposed at a given time, and the preference which one locality may claim over another. If the owner of property may prosecute the corporation, on the ground that sufficient sewerage has not been provided for his premises, all these questions must be determined by a jury, and thus, the judgment which the law has committed to the city council, or to an administrative board, will have to be exercised by the judicial tribunals. . . .

[After referring to certain decisions.] It may, therefore, be laid down as a very clear proposition, that if no sewer had been constructed at the locality referred to, an action would not lie against the corporation, though the jury should find that one was necessary, and that the defendants were guilty of a dereliction of duty, in not having constructed one.

But the defendants put down a sewer, which was insufficient to carry off all the surface water which fell during a violent shower. There was no want of skill in constructing it; simply, it was not sufficiently large. The evidence was, that it could not have been made larger, on account of the grade and size of the system of sewers with which it connected, and through which the water had to be carried off. The evidence as to this was entirely uncontradicted; and there was nothing intrinsically improbable in the assertion. Unless the defendants were responsible for the want of judgment upon which that system was devised, I do not see why this evidence was not a complete answer to the action; and that they were not responsible for that, follows from what has already been said. . . .

The cases of *Barton v. City of Syracuse* (37 Barb. 292); *Hudson v. City of New York* (*supra*); *Conrad v. Trustees of the Village of Ithaca* (16 N. Y. 158); *West v. Trustees of Brockport* (in note to the last case), and *Latour v. City of New York* (3 Duer, 406), are all cases where the injury was either the result of suffering a municipal work to be out of repair, or where the defendants had done acts which were in themselves positive nuisances. They furnish no ground for holding a municipal corporation responsible for not providing suitable sewerage, whether the neglect was total, or partial only arising from the insufficiency of a sewer to discharge all the water which it was intended to carry off. . . .

Judgment reversed, and new trial awarded.

WHEELER v. CITY OF CINCINNATI

19 Ohio St. 19. 1869

THE plaintiff brought this action in the Court of Common Pleas of Hamilton County, seeking to recover from the defendant the damages arising from the casual destruction of his house (situated within the limits of said city) by fire, on the ground that the defendant had failed and neglected to provide the necessary cisterns and suitable engines for extinguishing fires, in that quarter of the city in which his said house was situated, and that certain officers and agents of the fire department of said city had neglected and failed to perform their duties in regard to the extinguishing of said fire, by reason whereof said fire was not extinguished, as it otherwise might, and could, have been. A demurrer to his petition, alleging these facts, was sustained by the court, and judgment rendered for the defendant, which was subsequently affirmed by the district court, upon proceedings in error.

The plaintiff now seeks a review and reversal of those judgments, on the ground of error in sustaining the demurrer to his petition.

J. T. Crapsey and Collins & Herron, for the motion.

J. Bryant Walker (Walker & Conner), contra.

BY THE COURT. The laws of this State have conferred upon its municipal corporations power to establish and organize fire companies, procure engines and other instruments necessary to extinguish fire, and preserve the buildings and property within their limits from conflagration; and to prescribe such by-laws and regulations for the government of said companies as may be deemed expedient. But the powers thus conferred are in their nature legislative and governmental; the extent and manner of their exercise, within the sphere prescribed by statute, are necessarily to be determined by the judgment and discretion of the proper municipal authorities, and for any defect in the execution of such powers the corporation cannot be held liable to individuals. Nor is it liable for a neglect of duty on the part of fire companies, or their officers, charged with the duty of extinguishing fires. The power of the city over the subject is that of a delegated quasi sovereignty, which excludes responsibility to individuals for the neglect or non-feasance of an officer or agent charged with the performance of duties. The case differs from that where the corporation is charged by law with the performance of a duty purely ministerial in its character. We know of no case in which an action like the present has been held to be maintainable. *Brinkmeyer v. Evansville*, 29 Ind. R. 187; *Western College of Medicine v. City of Cleveland*, 12 Ohio St. R. 375.

Leave to file petition in error refused.

7. *For Failure to Perform a Ministerial Duty Made Mandatory on the Corporation by Statute*

WINPENNY *et al.* v. PHILADELPHIA *

65 Pa. St. 135. 1870

THIS was an action on the case against the city. The cause of action alleged was the negligence of the defendant in permitting the navigation of the river Schuylkill to be obstructed by a sunken barge, against which the plaintiffs' tug-boat struck and was injured. In the court below the plaintiffs were nonsuited; they took out a writ of error.

AGNEW, J. . . . Whether at common law it was the duty of cities and towns to keep their ports free from obstructions appears (says the learned District Judge) to be a question involved in doubt. . . . But whatever may be the law necessary to the safety of commerce in a long-settled, wealthy, and populous country, the circumstances attending the settlement of this State, and the total inability of the people along the navigable streams to keep them free from obstructions, leave no doubt of the law as understood here. . . . The general understanding in this country is, that the clearing out of streams and removing obstructions to navigation belong to the State or the United States, according to the character of the stream, as confined within State limits, or extending beyond and necessary to inter-state commerce. Yet it is not a duty of perfect obligation, but one of voluntary assumption, or imperfect obligation, inasmuch as it cannot be enforced against the will of the State.

The loss of the plaintiff would, therefore, fall upon himself had it happened in any other part of the State. But by the twenty-eighth section of the Consolidation Act, passed 2d February, 1854, P. L. 21, it is made the duty of the city councils, "after the requisite surveys and soundings thereto have been made, to fix the lines beyond which no wharf or pier shall be constructed, and to keep the navigable waters within said city for ever open and free from obstructions." It is argued this duty is restricted to the space within the wharf lines. But this is opposed to the language of the act referring to the *navigable* waters which are to be kept open and free of obstructions. The *navigable* waters are evidently those outside of the wharf lines. The duty, therefore, is express, and the consequences of negligence rest on the city. . . .

Judgment of nonsuit reversed, and a *procedendo* awarded.

Ordnance does not show more a statute

Key Highways - Injuries from defects 1861

187 Nature of liability

188 Case of 4th St. Bridge

CHAP. IX] 189 State of Washington
WEIGHTMAN v. CITY OF WASHINGTON

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WEIGHTMAN v. CITY OF WASHINGTON *

1 Black (U. S.) 39. 1861

WRIT OF ERROR to the Circuit Court for the District of Columbia.

The action is trespass on the case to recover damages for personal injuries caused to the plaintiff by the falling of a certain bridge between Washington and Georgetown, while he was being driven across it in an omnibus. The declaration alleges that the bridge was a common and public bridge which the defendants had been accustomed to keep in repair; and that the defendants ought to have made such repairs as would render it safe and convenient for travelers; but that, nevertheless, the bridge was, at the time of the injury, in an insecure, unsafe, and dangerous condition, by reason of the default and negligence of the defendants, etc.

Issue was joined on the city's plea of not guilty and the parties went to trial. It appeared at the trial that the bridge was constructed in pursuance of an ordinance of the city, under the direction of a committee which consisted of the mayor and two members of the council. There was conflicting evidence as to whether the committee were negligent in approving the original design of the bridge, and as to whether negligence was to be attributed to the city because of the perceptibly weakened and insecure state of the bridge some days before it fell. The provisions of the city's charter are stated in the opinion.

At the prayer of the city, the court instructed the jury that upon the whole evidence the plaintiff could not recover in this action, and the plaintiff excepted. Verdict was therefore given for the city.

Mr. Bradley and Mr. Carlisle, for plaintiff.

Mr. Davidge, for defendant.

MR. JUSTICE CLIFFORD. . . . Where there is no evidence to sustain the action, or one of its essential elements, the court is bound so to instruct the jury; but where there is evidence tending to prove the entire issue, it is not competent for the court, although the evidence may be conflicting, to give an instruction which shall take from the jury the right of weighing the evidence and determining its force and effect, for the reason that, by all the authorities, they are the judges of the credibility of the witnesses, and the force and effect of the testimony. *Greenleaf v. Birth* (9 Pet. 299); *Bank of Washington v. Triplet et al.* (1 Pet. 31). Applying that rule to the present case, it is clear, in view of what has already been stated, that the charge of the court cannot be sustained, if the defendants are liable in this form of action, under any circumstances, for such an injury.

It is not, however, upon any such ground that the defendants attempt to sustain the instruction, but they insist that, being a municipal corporation, created by an Act of Congress, they are invested with the power over the bridge merely as agents of the public, from public con-

considerations and for public purposes exclusively, and they are not responsible for the nonfeasances or misfeasances of the persons necessarily employed by them to accomplish the object for which the power was granted. Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty. But the duties arising under such grants are necessarily undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens imposed, and the consequent responsibilities arising, under another class of powers usually to be found in such charters, where a specific and clearly-defined duty is enjoined in consideration of the privileges and immunities which the act of incorporation confers and secures. Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirements of the charter; and it is equally clear, when all the foregoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence and unskillfulness in its performance. . . . Whether the action in this case is maintainable against the defendants or not, depends upon the terms and conditions of their charter, as is obvious from the views already advanced.

By the second section of their charter it is provided, among other things, that they shall continue to be a body politic and corporate, . . . "and, by their corporate name, may sue and be sued, implead and be impleaded, grant, receive, and do all other acts as natural persons." They may purchase and hold real, personal, and mixed property, and dispose of the same for the benefit of the city. Large and valuable privileges also are conferred upon the defendants; and the thirteenth section of the charter provides, in effect, that the defendants shall have the sole control and management of the bridge in question, . . . and shall be chargeable with the expense of keeping the same in repair, and rebuilding it when necessary." Comment upon the provision is unnecessary, as it is obvious that the duty enjoined is as specific and com-

plete as our language can make it; and it is equally clear, that the bridge is placed under the sole control and management of the defendants; and, in view of the several provisions of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge was imposed upon the defendants, in consideration of the privileges and immunities conferred by the charter. Most ample means, also, are placed at the disposal of the defendants, or within their control, to enable them to perform the duty enjoined. Whatever difference of opinion there may be as to the other conditions required to fix the liability, on this one, it would seem there can be none, as the defendants have very large powers to lay and collect taxes on almost every description of property, real and personal, as well as on stocks and bonds and mortgages, and they also derive means for the use of the city from granting licenses, and from the rents and profits of real estate which they own and hold. All the conditions of liability, therefore, as previously explained, concur in this case.

It is supposed by the defendants that the decision of this court in *The City of Providence v. Clapp* (17 How. 161) is opposed to the right of the plaintiff to maintain this action; but we think otherwise. Injury had been received by the plaintiff in that case, in consequence of one of the principal streets of the city having been blocked up and encumbered with snow; and the principal question was, whether such an obstruction was one within the meaning of the statute of the State on which the action was founded; and the court held that the city was liable. Cities and towns are required by statute, in most or all of the northeastern States, to keep their highways safe and convenient for travelers by day and by night; and if they neglect that duty, and suffer them to get out of repair and defective, and any one receives injury through such defect, either to his person or property, the delinquent corporation is responsible in damages to the injured party. No one, however, can maintain an action against the corporation grounded solely on the defect and want of repair of the highway, but he must also allege and prove that the corporation had notice of the defect or want of repair, and that he was injured, either in person or property, in consequence of the unsafe and inconvenient state of the highway. Duty to repair, in such cases, is a duty owed to the public, and consequently, if one person might sue for his proportion of the damages for the non-performance of the duty, then every member of the community would have the same right of action, which would be ruinous to the corporation; and, for that reason, it was held, at common law, that no action, founded merely on the neglect to repair, would lie. It was a sound rule of law, and prevails everywhere to the present time. Reference is often made to the case of *Russell v. The Men of Devon* (2 Term, 667) as an authority to show that no action will lie against a municipal corporation in a case like the present; but it is a misapplication of the doctrine there laid down. Suit was brought, in that case, against the inhabitants of

a district, called a county, where there was no act of incorporation, and the court held that the action would not lie; admitting, however, at the same time, that the rule was otherwise in respect to corporations. But whether that be so or not, the rule here adopted has been fully sanctioned in all the English courts. *Henley v. The Mayor, etc., of Lyme* (5 Bing. 91). It was ruled in the common pleas by Best, C. J., and the case was then removed into the King's Bench by writ of error, and was then decided by Lord Tenterden and his associates in the same way. *Same v. Same* (3 Barn. & Adol. 77). Judgment of affirmance having been given in the King's Bench, the cause was removed to the House of Lords by another writ of error, sued out by the same party. Baron Parke gave the opinion on the occasion, all of the other judges and the lord chancellor concurring. Among other things, he said that, in order to make good the declaration it must appear, first, that the corporation is under a legal obligation to repair the place in question; secondly, that such obligation is matter of so general and public concern that an indictment would lie against the corporation for non-repair: thirdly, that the place in question is out of repair; and lastly, that the plaintiff has sustained some peculiar damage beyond the rest of the king's subjects by such want of repair; and after explaining these several conditions, and showing that the case fell within the principles laid down, he stated that it was clear and undoubted law, that wherever an indictment would lie for non-repair, an action on the case would lie at the suit of a party sustaining any peculiar damage. *Mayor of Lyme Regis v. Henley* (2 Cl. and Fin. 331). Numerous decisions have, since that time, been made by the courts in this country, approving the rule laid down in that case, and applying it to cases like the present. *Erie v. Schwingle* (22 Penn. 384); *Storrs v. The City of Utica* (17 N. Y. 104); *Conrad v. The Trustees of Ithaca* (16 N. Y. 159); *Browning v. The City of Springfield* (17 Ill. 143); *Hutson v. The City of N. Y.* (5 Sand. S. C. R. 289); *Lloyd v. The Mayor, etc., of the City of N. Y.* (1 Seld. 369); *Wilson v. City of N. Y.* (1 Denn. 595; 2 Denn. 450); *Rochester White Lead Co. v. The City of Rochester* (3 Cqw. 463); *Smoot v. The Mayor, etc., of Wetumpka* (24 Ala. 112); *Hicocke v. The Trustees of the Village of Plattsburg* (15 Barb. S. C. 427); *Mayor, etc., of N. Y. v. Furze* (3 Hill, 612). Contrary decisions, undoubtedly, are to be found, but most of the cases are based upon a misapplication of what was decided in *Russell v. The Men of Devon*, to which reference has already been made, and which is certainly not an authority for any such doctrine at the present time. In view of the whole case, we are of the opinion that the charge of the Circuit Court was erroneous, and the judgment is accordingly reversed with costs, and the cause remanded, with directions to issue a new venire.

Miscellaneous
3 Com. 463

PRAY v. THE MAYOR, ETC., OF JERSEY CITY *

32 N. J. L. (*Supreme Ct.*) 394. 1868

THIS case was tried before the Circuit Court of the County of Hudson, and came before this court on a case certified.

The suit was for the loss of a horse which was fatally injured by coming in contact with an obstruction in one of the streets of Jersey City. The obstruction consisted of a stone coping around a sewer man-hole, which had been allowed to stand above the surface of the street by the neglect of the city to fill in around it.

BEASLEY, C. J. The present case turns on the solution of a single legal question, viz., whether a civil suit will lie against a municipal corporation, in consequence of damages sustained by an individual, by reason of a public street being in an improper condition. The defendants are charged with an omission of duty. It appeared on the trial that the sewer in the street was properly and skillfully constructed, the complaint being that the public authorities neglected to have the street filled in to the requisite grade, in consequence of which the coping of stone around one of the entrances into the sewer was left projecting, and formed the obstacle which occasioned the accident giving rise to this suit.

The question as to the extent of the responsibility, in a civil action, of a corporate body entrusted by statute with the performance of a public duty, and receiving therefrom no profits or emoluments for itself, has recently received a very elaborate examination in the important case of *The Mersey Docks and Harbor Board Trustees ads. Gibbs and others*, Law Rep., English and Irish Appeals, vol. 1, p. 93. A reference to this decision, in which the train of cases on the subject are carefully collated and criticised, will disclose the fact of the great discordance in judicial opinion, with regard to the question involved. And it will also appear, from the briefest examination of the American reports, that the legal mind of this country upon this topic is in a similar state of dubiety. If the matter, therefore, were one *primae impressionis* in this court, it is obvious a broad field for investigation would be thrown open; but such is not the case. I consider the question in this State as so entirely settled, that it admits of no debate. In the year 1840, the case of *The Freeholders of Sussex v. Strader*, reported in 3 Harr. 108, was decided, and the principle adopted as one of the grounds of adjudication, was, that an action would not lie at the instance of an individual having suffered a special damage from the neglect of a corporate body, in the performance of a public duty. It is an utter misapprehension of the standing of the case to suppose, as was done on the argument before us, that the conclusion of the court rested on the statutes of the State relating to bridges. The language used by the Chief Justice, and by Mr. Justice Dayton, who each delivered an opinion, is so clear, that the views

entertained by the court, and the legal groundwork on which the result was put, cannot be deemed to be left in the least uncertainty. The case, then, before the court was not regarded in any respect as of an exceptional character, but was treated and decided as one of a class regulated and controlled by a rule of law, having a wide scope and embracing every instance within the reason of such rule. "The principle," says the Chief Justice, "I take to be this: that where a corporate body, whether of a municipal or of a private character, owes a specific duty to an individual, an action will lie for a breach or neglect of that duty, whenever such breach or neglect has occasioned an injury to that individual. But if such corporation owe a duty to the public, and neglect to perform it, although every individual comprising that public is thereby injured, some more, and some less, yet they can have no private remedy at the common law." Such was one of the main grounds of decision in the case reported — a ground which, in principle, obviously rules the case now before this court. The rule of law thus promulgated nearly thirty years ago, has never, so far as I am aware, been disturbed by any hint of a doubt as to its propriety, from the bench. It has often, at the circuits, received a practical application, and it has, on several occasions, been recognized as a part of the legal system of the State, by this court. In *Cooley v. Freeholders of Essex*, 3 Dutcher, 415, under circumstances apparently identical with those of the original case, the same doctrine was applied by this court. And in *Callahan v. Township of Morris*, 1 Vroom, 161, in defining the obligation of the townships, with regard to the repair of highways, Chief Justice Whelpley remarks: "The common law casts upon the township the burthen of making and repairing its public highways, as it does upon the county that of making and repairing bridges. But the township is not liable civilly for a neglect of the duty, to anybody sustaining especial injury thereby, nor is a county, in a like case, for injury arising from non-repair of bridges. The duties are owing to the public — not individuals — and their performance is enforced by indictment, not suit by individuals."

But the most authoritative sanction of the doctrine is to be found in the case of *Livermore v. Board of Freeholders of the County of Camden*, 5 Dutcher, 245. The suit was for a special damage, caused by the neglect to repair a bridge. In the Supreme Court the decision, which was against the liability of the defendants, went on the comprehensive theory that a public body was not amenable *civiliter*, in consequence of a neglect of duty. This case was afterwards, in the term of June, 1864, affirmed, and placed on a similar foundation in the Court of Errors, 2 Vroom, 508. "That an action will not lie," says the opinion which was read on this last occasion, "in behalf of an individual who has sustained special damage from the neglect of a public corporation to perform a public duty, I consider the settled law of this State. This was the doctrine laid down by the Supreme Court of this State, after much research and a careful consideration of the authorities, in the case of the *Board*

of *Freeholders of Sussex v. Strader*, 3 Harr. 108, and the same principle was re-affirmed in the case of *Cooley v. Freeholders of Essex*, 3 Dutcher, 415. These opinions, in my judgment, rest upon the solid foundations of ancient precedent and public policy."

From this review of the decisions, it is quite impossible to avoid the conclusion that the adjudication in *Strader v. Freeholders of Sussex*, not only decided that case, but acknowledged and established an important rule of law, which is, that the neglects of agents of the public, in the discharge of their legitimate functions, cannot constitute the basis of an action in behalf of an individual who has sustained a particular damage. Such neglects are public offenses, and must be remedied by indictment.

The plaintiff's case being within the regulation of this principle, he should have been non-suited at the trial, and the Circuit Court should be so advised.

GRANGER *et al.* v. PULASKI COUNTY

26 Ark. 37. 1870

BOWEN, J. Daniel B. Granger and Alice C., his wife, brought an action, in the Pulaski Circuit Court, against the county of Pulaski, seeking to recover damages for injuries received by said Alice C. Granger, by being thrown from a bridge on a public highway in said county, in consequence of the insecure condition of the bridge, etc. The appellee demurred to the declaration, which was sustained, from which ruling and judgment of the Circuit Court Granger appealed. The principal point raised by the demurrer is, whether any action lies against a county in this State for damages resulting from a defect in a public highway. gn

Counties are a political division of the State government, organized as part and parcel of its machinery, like townships, school districts, and kindred sub-divisions. They do not derive any of the corporate powers they possess by a special charter. Their functions are wholly of a public nature, and their creation a matter of public convenience and governmental necessity; and in order that they may the better subserve the public interest, certain corporate powers are conferred on them. Whether they will assume their corporate powers and perform the duties and obligations imposed, are questions over which they have no choice, but their assumption is wholly involuntary.

They have been termed *quasi* corporations, possessing no power, and incurring no obligations save those especially conferred or imposed by statute. Chief Justice Parker, of Massachusetts, in speaking of these involuntary corporations, said: "That they are not bodies politic and corporate, with the general powers of corporations, must be admitted," and the reasoning advanced to show their defect of power is

conclusive: "They may be considered, under our institutions, as *quasi* corporations, with limited powers, co-extensive with the duties imposed upon them by statute or usage, but restrained from the general use of authority, which belongs to these metaphysical persons."

Rule

It is well settled that, at common law, these *quasi* corporations are not liable to a private action at the suit of a party injured, resulting from the non-performance by its officers of a corporate duty, and no such action lies unless given by statute. This doctrine has been repeatedly asserted and applied by the courts of this State, where actions have been brought against counties and townships for injuries received in consequence of defects in the public highway. We know of but one State in which a contrary opinion is held. See *Mower v. Leicester*, 9 Mass. 250; *Bartlett v. Crozier*, 17 Johnson, 439; *King v. Police Jury*, 12 La. 858; *Hedges v. County*, 1 Gilliam, 567; *Moray v. Neufane*, 8 Barb. 645, 21 Cal. 426, 2 N. H. 393, 27 Barb. 543, 4 Mich. 557, 11 N. Y. 392.

In the case of *Humphries v. Armstrong County*, 56 Pa. St. R. 204, cited by appellants, the question here raised does not seem to have been passed upon. It may be observed, however, that the statute of that State makes it an imperative duty for the county to repair all bridges in the county.

Numerous decisions have been cited by appellant's counsel, wherein cities and municipal corporations have been held liable. It must be borne in mind, however, that municipalities are usually created by express charter, in which the State parts with a portion of her sovereignty, and grants them large powers of self-government; larger powers of acquiring and controlling corporate property are conferred than on counties; special and peculiar privileges are given them as to streets and public ways, and special authority given for the use of public ways for the convenience of the citizens, unknown elsewhere. The benefits conferred raise an implied promise of the corporation to fulfill every corporate duty and obligation. The assumption of corporate powers by a municipality is voluntary. In this respect they assimilate a private corporation; and, having accepted a valuable franchise on the condition of the performance of certain public duties, are held to contract by the acceptance, for the performance of those duties.

There is no statute in this State rendering counties liable in actions sounding in *tort*, and the Circuit Court did not, therefore, err in overruling appellants' demurrer.

Judgment affirmed.

HINES v. CITY OF LOCKPORT *

50 N. Y. 236. 1872

ACTION to recover damages for personal injuries sustained by falling through a defective crosswalk on one of defendant's streets. It appeared that the crosswalk was built under the direction of the common council of the city, and that it had for a long time been obviously in a dangerous condition. The provisions of the city charter are set forth in the opinion. The referee found that under those provisions the council had discretionary power to direct the crosswalk to be repaired, for failure to exercise which the city was not liable. There was judgment for defendant, which was reversed by the Supreme Court. Appeal.

James F. Fitts, for the appellant.

S. W. Lockwood, for the respondent.

RAPALLO, J. Where power is conferred on public officers or a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is *quasi* judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power, or an erroneous estimate of the public needs, no civil action is maintainable. *Mills v. City of Brooklyn*, 32 N. Y. 489.

But when this discretion has been exercised, and the street, sewer, or other improvement has been made, the duty to keep it in repair so as to prevent it from being dangerous to the public, is ministerial, and for a negligent omission to perform this duty, an action lies by the party injured. 36 N. Y. 54; 32 *id.* 489; 1 Den. 595; 9 N. Y. 169; 45 *id.* 129; 46 *id.* 194; 37 *id.* 568.

The absence of the necessary funds and of the legal means of procuring them will excuse the non-performance of this duty; but it seems that such absence of means should be shown as a defense. *Hover v. Barkhoof*, 44 N. Y. 113, 118; *Adsit v. Brady*, 4 Hill, 630, 634.

The provision of the charter of the city of Lockport (Laws of 1865, p. 661), which empowers the common council of the city to direct the making, repairing, etc., of streets, alleys, sidewalks, and crosswalks, and the provision (Laws of 1865, p. 670, as amended by Laws of 1867, p. 2071), constituting the common council commissioners of highways for said city, and authorizing them to regulate and repair the streets, alleys, highways, bridges, side and crosswalks, etc., in connection with the provisions at pages 2075 and 2076 of the Laws of 1867, and page 2007 of Laws of 1869, which authorize them to use, in defraying the expenses of repairing and keeping in order the highways, streets, etc., \$2,500 of the money they are authorized to raise, and also moneys collected by poll tax, with the power to assess inhabitants for high-

way labor, were, in our judgment, sufficient to cast upon the city the duty of keeping in a safe condition the crosswalk in question, which had been constructed under the direction of the city, and was laid in a highway. The provisions of the Act of 1866, pages 1162, 1163, 1164, which authorize assessments for local improvements, including the repair of sidewalks and crosswalks, did not, in our opinion, relieve the city from that duty. The city is not restricted to the measures therein provided, in making necessary repairs to existing crosswalks, but has power to act directly under the other provisions of the charter. There is no finding or proof that the means placed at the disposal of the city for the purpose of highway repairs had been exhausted, nor did the referee place his judgment upon any such ground, but upon the sole ground that the power to repair was discretionary, and the city was not responsible for omitting to exercise it.

In this we think he erred. The power was imperative, and imposed upon the city the duty to exercise it, though words of command were not used. *Hudson v. Mayor, etc.*, 9 N. Y. 163; *Mayor, etc., v. Furze*, 3 Hill, 612. Whether discretionary or not depends upon the nature of the power or duty, and, as has been shown, the duty of keeping highways, etc., in such repair as to be safe, is not discretionary or judicial in its nature, but ministerial. . . .

Judgment accordingly.

TODD v. CITY OF TROY *

61 N. Y. 506. 1875

APPEAL from the judgment of the General Term of the Supreme Court affirming a judgment for plaintiff upon the verdict of a jury.

Action to recover damages for personal injuries caused while walking on a sidewalk in defendant city by slipping on ice and falling. Further facts appear in the opinion.

EARL, C. The defendant is a municipal corporation, incorporated in pursuance of the act of the legislature, passed April 12, 1816, and several acts amendatory thereof. By these acts the common council are made commissioners of highways in and for the city, and it is made their duty to regulate and keep in repair the streets of the city.

It was the duty of the city, under its charter, to keep the streets in repair and in suitable condition for public travel, and any person suffering damage or injury, without any fault on his part, from a neglect of this duty, has a cause of action against the city. Before the city can be made liable in any case, it must be shown that it had notice of the bad condition of the street. This notice can either be express or

constructive. By constructive notice is meant such notice as the law imputes from the circumstances of the case. It is the duty of the municipal authorities to exercise an active vigilance over the streets; to see that they are kept in a reasonably safe condition for public travel. They cannot fold their arms and shut their eyes, and say they have no notice. After a street has been out of repair, so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice and charges it with negligence. *Hart v. City of Brooklyn*, 36 Barb. 226; *Clark v. City of Lockport*, 49 id. 580; *Conrad v. Village of Ithaca*, 16 N. Y. 158; *Requa v. City of Rochester*, 45 id. 129; *Hyatt v. Trustees, etc., of Rondout*, 44 Barb. 385. Upon the trial there was some evidence that, near the place where the accident occurred, a conductor had for a long time come down from a house discharging water upon the sidewalk, which ran across the same into the street gutter. This water would alternately thaw and freeze, according to the temperature of the weather, and for some days before the accident there was ice upon the sidewalk extending across the same. This ice was concealed by a slight covering of snow which had recently fallen, and upon this the plaintiff slipped and was injured. Upon this evidence it was a question for the jury to decide, whether it was negligence for the municipal authorities to permit this water to flow upon the sidewalk, and thaw and freeze there and form ice remaining there for some days. It was also a question for the jury to decide, whether the existence of this State of things, for the length of time and under the circumstances, in a street much traveled, which was easy to observe, and must have been seen by many persons, ought to have been known by the defendant; in other words, to decide whether the defendant was guilty of negligence in not knowing facts so notorious. Upon these questions there was some evidence, I admit not very strong, and the jury decided them in favor of the plaintiff; and their decision, having been approved at Special and General Terms, is conclusive upon us. . . .

Judgment affirmed.

MAYOR, ETC., OF BALTIMORE v. O'DONNELL, *p. p. a.*

53 Md. 110. 1879

IRVING, J. This appeal presents the single question, whether the mayor and city council of Baltimore are liable, in damages, to the appellee, for injuries received by him, while West Street, one of the

streets of the corporation, was undergoing repair, by reason of the neglect of the contractor, who was doing the work, to give sufficient warning of the work being in progress. The facts are few. West Street, which is admitted to be one of the streets of the city of Baltimore, was, by ordinance, directed to be repaired, re-paved, and re-curbed. Joseph C. Manning, a contractor, entered into contract with the mayor and city council to do the work. He employed Frederic Crowley to superintend the work. The street being impassable, Crowley caused a rope to be stretched across the street to prevent travel thereon. He directed a person to suspend a lamp from the rope as a warning. The person whom he left in charge did suspend such lamp, but it was immediately broken and extinguished by stones thrown by some boys. The person left in charge took the lamp to his home, in the vicinity, to repair or replace it and did not replace it that night. During his absence the appellee, in attempting to pass up that street, driving his hack, came in contact with the rope, of which he had no warning, and received the injuries for which he sued the appellant. No officer of the city had notice of the rope being stretched across the street, and Crowley had no orders from the city authorities or any other person on the subject.

The appellant contends that, inasmuch as the work was being done by an independent contractor, pursuing an employment wholly independent of the city, who was free to exercise his own judgment as to the mode of conducting the work, and the assistants he was to employ, the rule of *respondet superior* does not apply, and the contractor alone is responsible, if any one is. In reply the appellee admits, that ordinarily as a condition precedent to holding *superior* amenable, the relation of master and servant must be shown to exist, and that in the case of a contractor employing others to do the work these sub-employees cannot be strictly regarded as servants of the city, but he insists that another rule applies which fixes the responsibility of the city in this case. That rule he insists is this, that where the person for whom the work is to be done is under a pre-existing obligation to have the work done in a particular way, or to have certain precautions against accident observed, he cannot be discharged by creating the relation between himself and another of employee and contractor. The learned judge who decided the case below regarded the appellant as under such pre-existing obligation, and so instructed the jury, and it is that ruling we are asked to review.

This is a question upon which there is some conflict of authority, and is therefore not entirely free from difficulty.

The cases of *Barry v. St. Louis*, 17 Mo. 121, and *Painter v. Mayor*, 46 Pa. St. 213, cited by the appellant, strongly sustain their position, but the weight of authority is the other way, and upon full examination we think that sound reason and proper public policy do not sustain the decisions in Missouri and Pennsylvania on the subject.

The case of *Storrs v. The City of Utica* (17 N. Y. 109) is precisely analogous to this case and lays down the law, as we think, in accordance with sound principle. In that case there was a sewer to be built, and the city let out the contract of building it. In making the sewer, an excavation was made in the street, which was left open in the nighttime, without guards, lights, or warnings of the danger it created. Plaintiff drove into it and was injured. Defense was made that the contractor was liable and not the city; but this defense was not sustained by the court and plaintiff recovered against the city. On appeal the Supreme Court affirmed Judge Pratt's ruling, and on further appeal to the Court of Appeals, that court affirmed the decision. Judge Comstock, in delivering the opinion of the court, puts the decision on the express ground that the obligation rested on the municipal corporation to keep the streets in a safe condition for travel. He says, "although the work may be let out by contract, the corporation still remains charged with the care and control of the street, in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not all depend on the care or negligence of the laborers employed by the contractor. The danger arises from the very nature of the improvement, and if it can be averted only by special precautions such as placing guards or lighting the street, the corporation, which has authorized the improvement, is plainly bound to take those precautions. The contractor may very properly be bound by his agreement not only to construct the sewer, but also to do such other acts as are necessary to protect travel. But a municipal corporation cannot, I think, in this way either avoid indictment on behalf of the public, or its liability to individuals." The same doctrine is maintained by the Supreme Court of the United States in *City of Chicago v. Robbins*, 2 Black, 418, and in *Robbins v. Chicago City*, 4 Wallace, 657. The weight of authority is now so much in favor of this view, that Judge Dillon in his excellent work on *Municipal Corporations*, sections 791, 792, 793, states this to be the better doctrine. In *Josiah Eyler v. The County Commissioners of Allegany*, 49 Md. 257, the court had occasion to examine the many cases on this subject, and recognized the authorities to which we have adverted as properly defining the law. In that case the Chesapeake and Ohio Canal was shown to be under obligation to keep up a certain bridge over a public road which the canal crossed. Its obligation was undeniable, but this court held that the county commissioners were not thereby exempted from liability for injury resulting from the non-repair of the bridge, which formed a part of the public highway, because the primary obligation rested on them to see to it that the public highways were kept in a safe and passable condition. The opinion, in that case, so fully collates and considers the authorities bearing on this subject, it is wholly unnecessary to extend this opinion by further citations. It is proper to say

that *Deford's Case*, 30 Md. 179, which has been cited by appellants' counsel to sustain his view, does not conflict with the principles herein announced. One of the very grounds of removal in that case was that an instruction granted excluded from the jury the consideration of the question whether or not the work being done by Deford was not in itself a nuisance. Besides, the case in no way involved this question of primary obligation belonging to a municipal corporation. In the case under consideration the city might have provided by the contract for the exercise of due precaution by the contractor against an accident, so as to make the contractor answerable to the city, in the event of injuries sustained, but could not by the contract relieve itself from liability. The contract actually provides for the contractor's keeping the street in repair for two whole years after the work should be completed. If the view of the appellant, that the exclusive control of the street by the contract passed into the hands of the contractor be true, then the city's liability would be gone so long as the contractor's authority existed under the contract. That cannot be.

The court properly instructed the jury, in the first prayer of the plaintiff, "that it was the duty of the defendant to take proper precaution, by proper guards, signals, lights, or other warnings, to warn persons of the impassable condition of the street, so as to prevent injuries to persons passing along said street, and if the jury further find that the defendant, and those employed by it in repairing and ^v recurring said street, did not use ordinary care in providing such precautions, and that the plaintiff, in consequence of such neglect to provide such precautions, was thrown from his hack, while driving with ordinary care along said street, then the plaintiff is entitled to recover." No defect in the plaintiff's second prayer respecting the measure of damages has been pointed out, and the court sees none. The defendant's first prayer was properly rejected, because of the reasons already given to justify the plaintiff's first prayer. We find no error and the judgment will be affirmed.

Judgment affirmed with costs.

MCKIM v. CITY OF PHILADELPHIA

217 Pa. St. 243. 1907

TRESPASS to recover damages for death of plaintiff's husband.

MESTREZAT, J. Eleventh Street in the city of Philadelphia extends north and south, and crosses Federal Street nearly at a right angle. At the place of this accident it is one hundred feet wide and seventy feet from curb to curb, and in the middle has a single-track electric

railway line on which cars run north. The supply wires of the trolley system are supported by metal poles, placed alternately on the right and left, and near the track instead of at the curb. One of these poles stood near the west rail and about ten feet north of the north house-line of Federal Street. It was of iron, about nine or ten inches in diameter and supported by a conical shaped base which was about two and one-half feet in diameter at the street level and fifteen or eighteen inches in height.

John McKim, a milk dealer and the plaintiff's husband, drove a one-horse milk wagon east on Federal Street about 5.45 o'clock in the morning of January 24, 1903. He entered Eleventh Street and, turning to go north, his wagon struck the base of the trolley pole, was upset, and he was thrown to the ground and received severe injuries from which he died a few hours later. The morning was very dark, and there was no artificial light on the pole nor in the vicinity of the pole. There is an electric street light located at the southeast corner of Eleventh and Federal streets, but it had not been lighted for at least a week prior to the accident. McKim's wagon carried a light as required by city ordinance.

This action was brought by the widow of McKim to recover damages for his death which she alleges was caused by the negligent and improper conduct of the city in not keeping its street, at the place of the accident, in a reasonably safe condition for persons who had occasion to use it. She avers in her statement that the city permitted the pole with its large projecting base to remain in the street for more than two years without providing "means whereby such structural obstruction should be exposed or made conspicuous by proper light," and during the night of January 23, 1903, "without fixing or placing any light or signal near such obstruction to denote its position." The defense is that the trolley pole was located by authority of law, was a lawful structure, and was therefore not a nuisance, and that it was not an omission of duty on the part of the city to permit it to be constructed or remain on the location where it was placed without providing the necessary means to protect the public, using the street at night, against danger incident to a collision with it. On the trial below, the court directed a verdict for the defendant, and the plaintiff has taken this appeal.

It is conceded by the appellant that the trolley company was authorized by legislative and municipal action to locate and operate its railway on Eleventh Street and to place the poles, carrying the wires which supply electricity, along and near its track in the center of Eleventh Street. But the line was required to be constructed and maintained subject to municipal regulations and approval, as the city ordinance of August 5, 1886, provides that "the laying, construction and maintenance of all wires, . . . poles, or cables shall be under the supervision of the chief of the electrical bureau and subject to his approval; and the same shall be laid under the rules and regulations of the board of highway supervisors."

There is no doubt of the authority of the legislature to authorize an electric railway company to lay its tracks and operate its lines on the streets of a city or of any other municipality. And it may do so directly or by authorizing its agent, the municipality, to grant the authority, and it may empower the municipality to accompany the grant with such restrictions and limitations as may seem proper to protect the public in the use of the highways of the city. In 2 *Abbott on Municipal Corporations*, § 829, it is said: "The legislature, or one of its properly delegated agencies, may, by its action, authorize the use of a street in such a manner as will cause obstruction, and which, without authority, would be regarded as illegal and a nuisance. The discretionary power is often given municipal bodies to authorize these encroachments or obstructions, and where an abuse of discretion is not shown, their action will be sustained if coming within the general principles in respect to the creation and use of a highway." What, therefore, would otherwise be a nuisance if placed in a street may be legalized and relieved of this fault by legislative or municipal action.

Conceding the right of the electric company to place its poles in the center of the street, and that, by reason of municipal permission, they do not create a nuisance by being located there, yet there was a duty imposed upon the electric company to exercise the power conferred by the municipality in such manner and way as not unnecessarily to obstruct the highway or interfere with the purpose for which it was primarily constructed. Unless the intention is manifest, it will not be presumed that the legislature or its agent, the municipality, intended, when granting the right of the company to locate its poles in the middle of the street, to deprive the public of the right to use the street without danger and with safety to themselves. This is made more apparent by the fact that the city ordinance requires the poles to be located under the supervision and subject to the approval of the municipal officers. When an electric company invokes municipal action for its protection in occupying the streets of a city, it must appear that the company acted strictly in accordance with the authority conferred. In stating the English rule on the subject, Chief Justice Cockburn in *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679 (685) says: "When the legislature has sanctioned and authorized the use of a particular thing and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damages result from the use of such thing independently of negligence, the party using it is not responsible." That rule, of course, is limited in this country by the constitutional provision that prohibits the legislature from taking private property for public use without just compensation. But aside from this limitation, the rule as stated by the learned Chief Justice is certainly sound in principle, and clearly indicates that the beneficiary of the authority granted is required to exercise the legislative grant without negligence and with

the necessary precaution to prevent injury to another. In a recent work on nuisances it is said that the rule may be stated to be that where one has the sanction of the State for what he does unless he commits a fault in the manner of doing it, he is completely justified, provided the legislature has the constitutional power to act: *Joyce on Law of Nuisances*, § 69. And in § 73 of the same work, citing authorities to support the text, it is said: "So, though a corporation may be authorized by law to do a certain act, it must so use its powers as not to injure another. The fact that a work is a lawful and beneficial one will not relieve the party constructing it from liability to another who is injured by its improper and unskillful construction. The grant of a franchise by the State to a person does not confer upon him the right to inflict damage upon another which by reasonable caution could have been prevented." Mr. Smith in his *Modern Law of Municipal Corporations*, § 1097, after announcing the doctrine that the legislature may authorize a person or corporation to do an injurious act which would otherwise be a nuisance, proceeds to say: "And if the power may be exercised in a way not to seriously injure the public, but is exercised in a way regardless of the public interest, there will be no legislative protection. The grant of power is in all cases to be exercised in such manner as to least interfere with public rights and interests, and by construction the grant or license is construed in favor of the public. Besides, there is a high degree of care to be exercised in carrying out the grant of power in such cases." The rule is well stated by Mitchell, J., in *Village of Pine City v. Munch* (Minn.), 6 L. R. A. 763, where he says: "If the legislature expressly authorizes an act which must inevitably result in public injury, what would otherwise be a nuisance may be said to be legalized; but if they authorized an erection which does not necessarily produce such a result, but such result flows from the manner of construction or operation, the legislative license is no defense. In order to justify a nuisance by legislative authority it must be the natural and probable result of the act authorized, so that it may fairly be said to be covered by the legislation conferring the power: *Wood, Nuisances*, 853-861." In *Babbage v. Powers* (N. Y.), 14 L. R. A. 398, the defendant sought to excuse himself for maintaining a nuisance by having procured municipal permission for his act. It was held that he was not liable, in the absence of negligence; but Vann, J., delivering the opinion, says: "The person receiving the license is held to impliedly agree to perform the act permitted with due care for the safety of the public, and is made liable for any violation of duty in this regard." And in a more recent case in New York, *Morton v. Mayor, etc., of New York*, 140 N. Y. 207, s. c. 22 L. R. A. 241, it is held, as stated in the syllabus, that the legislative authority which will shelter an actual nuisance must be express, or a clear and unquestionable implication from powers conferred, certain and unambiguous, and such as to show that the legislature must have intended and contemplated the doing of the very act in question. "Lawful acts may be performed in such

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manner, so carelessly, negligently, and with so little regard to the rights of others," says Agnew, J., in *Pittsburg, Fort Wayne and Chicago Railway Co. v. Gilleland*, 56 Pa. 445, "that he who, in performing them, injures another, must be responsible for the damage."

Applying these principles to the case in hand, we think the learned court below erred in withdrawing the case from the jury and directing a verdict for the defendant city. In this State, as all our cases on the subject declare, the highways are primarily for the passage of persons on foot and in vehicles. It is the duty of the municipal authorities having control of the highways to keep that fact in view, and while permitting them to be used for other purposes, it should not be done in a manner which would prevent their use by the public or would render them unsafe and dangerous. Seventy years ago the legislature of this State declared that the public highways should be constantly kept in repair and kept clear of all impediments to easy and convenient passing and traveling. This is the law of the Commonwealth to-day, and includes the cities as well as the rural districts. The electric company was authorized by the ordinance to locate and operate its railway on Eleventh Street, but there is nothing in the ordinance from which even an inference can be drawn that the use of Eleventh Street by the company should exclude the public from it or that the company was authorized to construct or operate its railway in a manner which would render the street unnecessarily dangerous. As it was the duty of the city to keep its streets clear of unnecessary impediments or obstructions and reasonably safe for public use, we cannot assume or infer that the councils intended to hand over Eleventh Street to the electric company with permission to erect and maintain obstructions on it in total disregard of the rights of the public. In view of this duty of the city and of the unquestioned duty of the electric company to construct this line so as to maintain the street in a reasonably safe condition for use by the public, the question arises in this case, whether the electric company observed its duty in exercising the authority conferred by the city, or whether it negligently erected this pole or negligently maintained it so as to cause the accident which resulted in the death of the plaintiff's decedent. These were questions for the jury. If the pole, either in its original construction, or in the manner of its maintenance, was dangerous to the public in the use of the street by day or night, municipal consent would afford the company no protection. The city, likewise, would be culpable, and liable to any person injured by reason of its neglect to protect him against the unlawful use of the street. In daylight, of course, the pole could be seen and avoided, but at night, and especially when it is very dark, as on this occasion, and could not be seen, a jury certainly would be justified in finding that it was a dangerous obstruction. If in the construction of its railway, it had been necessary to leave a hole in the street of equal dimensions with the base of the pole, it could not reasonably be pretended that municipal consent to construct the rail-

way on the street would authorize such action on the part of the company unless the public was, by some means, warned by day and night of the existence and location of the hole. The hole, however, would not be more dangerous than the base of the pole which caused McKim's death, and both would manifestly be a dangerous obstruction in the middle of a city street of a very dark night with no signals or lights to indicate their location. The rule which requires the streets of a city to be kept clear of dangerous impediments applies to the night-time as well as to the day-time, and demands of the municipality action which will maintain the safety of the street during the whole of the twenty-four hours.

The fact that there was ample space between the pole and the curb for teams to pass and repass, as suggested by the appellee, does not alter the case. This pole stood nearly in the center of the street where a traveler would presume there was safety and where instinctively he would go of a dark night in order that he might have safe transit. This was a thickly populated community, and notwithstanding the width of the street, the city as well as the electric company should have expected the frequent use of every part of the street, both by night and day. Care under the circumstances, therefore, required the company, and on its default, the city, to give notice of the presence of the pole to those who might be using the street at night. It was a question for the company, subject to the approval of the city, to determine what was necessary for this purpose; the only obligation resting upon either of them was that they took reasonable precaution to accomplish the purpose intended. This might have been done by a light on the pole itself, or by lights in the immediate vicinity of the pole, or in other ways, that could be suggested. The failure, however, to observe any precaution to protect people using the street during the night became a question of negligence which should have been submitted to the jury.

It is not necessary in this case to discuss or determine the duty of a city to light its streets. The broad question presented for decision here is whether the city under the circumstances disclosed by the testimony was guilty of negligence in permitting a dangerous obstruction on one of its streets which resulted in the death of the plaintiff's decedent. That is a question which, under a proper charge by the court, was for the jury. . . .

The eleventh and twelfth assignments are sustained, the judgment is reversed, and a *venire facias* is awarded.

8. *For an Error in the Exercise of Corporate Discretion: Fault in the Plan of an Undertaking*

TATE v. CITY OF ST. PAUL

56 Minn. 527. 1894

APPEAL by defendant, the city of St. Paul, from an order of the District Court denying its motion for a new trial.

GILFILLAN, C. J. The action is to recover damages arising from a sewer laid by defendant, and with which plaintiff had connected, as he had a right to do, setting the water in it back so that it flooded plaintiff's basements. The defect alleged in the sewer was that it was of insufficient capacity to carry off the water brought into it. The defect appears to have existed in the original plan for sewerage that part of the city; that is, the city, in determining upon a system of sewers, determined upon the sizes required for the main sewer and for the lateral sewers running into it, and the size determined on for the former proved too small.

The rule is uniformly conceded that for injuries wholly incidental to and consequential upon the exercise by a municipal corporation of the legislative or discretionary powers intrusted to it (as distinguished from its ministerial acts) no action will lie against it. Instances of the application of that rule are furnished by *Lee v. City of Minneapolis*, 22 Minn. 13, where the power exercised was establishing the grade of a street under the charter, and *Alden v. City of Minneapolis*, 24 Minn. 254, where the city had established a system of grades for streets and sidewalks, and drains, gutters, catch-basins, and sewers, and had constructed the streets, sidewalks, drains, and gutters, and partially completed the sewers. The complaint was that the sewers, drains, gutters, and catch-basins were not sufficient to carry off the surface water falling in rains upon the streets, so that it flowed from the streets upon plaintiff's lot. The line between legislative acts and ministerial acts of a municipal corporation is not very clearly marked by the decisions, nor is it necessary to attempt to trace it in this case.

Some of the earlier cases do not clearly recognize the distinction between injuries incidental to the exercise of municipal legislative functions, and direct and positive wrongs — such, for instance, as trespass — caused by it. The later and better authorities, however, recognize the distinction, and, while adhering to the rule that for the former no action will lie, hold that for the latter the party may recover. The distinction is apparent, though it is not clearly discussed in either of the cases, of *O'Brien v. City of St. Paul*, 18 Minn. 176 (Gil. 163), and 25 Minn. 331; *Kobs v. City of Minneapolis*, 22 Minn. 159; and the *Lee* and *Alden* cases above cited.

To determine when and upon what plan a public improvement shall be made is, unless the charter otherwise provides, left to the judgment of the proper municipal authorities, and is, in its nature, legislative. And, although the power is vested in the municipality for the benefit and relief of property, error of judgment as to when or upon what plan the improvement shall be made, resulting only in incidental injury to the property, will not be ground of action; as, if, in grading streets to the authorized grades, the plan of the grading is inadequate to drain a lot of the surface water, or even if it make it more difficult and expensive for the owner to drain it, or make access to the lot more difficult, that is a result incidental to the improvement. But for a direct invasion of one's right of property, even though contemplated by, or necessarily resulting from, the plan adopted, an action will lie; otherwise, it would be taking private property for public use without compensation. Thus, if, in cutting a street down to grade, the soil of an abutting lot is precipitated into the cut, or if, in filling up to grade, the slope of the embankment is made to rest on private property, that is a direct invasion of property rights which cannot be justified, even though the plan adopted contemplates, or will necessarily produce, the result.

Judge Dillon, in his work on *Municipal Corporations* (4th ed.), par. 1047-1051, approves the rule, laid down in more recent decisions by some of our ablest courts, that if a sewer, *whatever its plan*, is so constructed as to cause a positive and direct invasion of private property, as by collecting and throwing upon it, to its damage, water or sewage which would not otherwise have flowed or found its way there, the corporation is liable. Conspicuous for their ability, among the cases referred to by him, are *Ashley v. Port Huron*, 35 Mich. 296, and *Seifert v. City of Brooklyn*, 101 N. Y. 136 (4 N. E. 321), — each, the former especially, a very interesting case. See, also, *Brayton v. Fall River*, 113 Mass. 218; *Lehn v. City and County of San Francisco*, 66 Cal. 76 (4 Pac. 965); *Weis v. City of Madison*, 75 Ind. 241. It is impossible to answer the reasoning of these cases, especially where the injury complained of constitutes a taking. That making one's premises a place of deposit for the surplus waters in the sewers in times of high water, or creating a nuisance upon them so as to deprive the owner of the beneficial use of his property, is an appropriation requiring compensation to be made, see *Weaver v. Mississippi & R. R. Boom Co.*, 28 Minn. 534 (11 N. W. 114).

The court below instructed the jury "that where a public work, for instance a sewer, as the same was originally planned and constructed, is found to result in direct and physical injury to the property of another, that would not otherwise have happened, and which, from its nature, is liable to be repeated and continuous, but is remediable by a change of plan or the adoption of prudent measures, the corporation is liable for such damages as occur in consequence of the original cause,

after notice and an omission to use ordinary care to remedy the evil."

This is within the rule stated in *Dillon* and the cases cited, and, as it gives the corporation an opportunity to correct or obviate the error in the original plan before liability, we do not hesitate to approve it. This is as far as we need go in this case.

The evidence was such as to justify a verdict for plaintiff under that charge of the court.

Order affirmed.

CITY OF CIRCLEVILLE v. SOHN *

59 Ohio St. 285. 1898

ERROR to the Circuit Court. Action against the city for damages for personal injury from falling on a sidewalk. The petition alleges, in substance, that the injury was caused by the defendant's negligently permitting the sidewalk to remain in the following condition: The sidewalk, where it crossed an alley which intersected the street at a considerable incline, had been laid so that it conformed to the slope of the alley; and with a depression or gutter across the middle, to permit the surface drainage from the alley to flow over it. In times of freezing, this drainage formed ice on the sidewalk and made it dangerous. The petition alleges further that the plaintiff fell on frozen snow and ice which the defendant had, with knowledge, negligently suffered to accumulate there. The sidewalk had been constructed in that form over ten years previously.

At trial, the court charged substantially that if the injury was caused by the plan or design of the sidewalk the defendant was not liable; that if the crossing was constructed in a reasonably safe manner, according to a plan enacted by the city council, and the defect, if any, was in the plan alone, the plaintiff could not recover. The court refused plaintiff's requests for instructions to the effect that if the accumulation of ice combined with the condition of the pavement caused the injury, and the city had notice, the city was liable; that the duty to keep the sidewalk in repair was ministerial and not legislative; that the law required the city to construct and keep the sidewalk in a reasonably safe condition; that in the performance of this duty its authorities would act in a ministerial capacity; that for their negligence in so acting the city would be liable.

Verdict and judgment were rendered for the defendant; the Circuit Court reversed the judgment, for error in the charge and the refusal. The city brings the case up on error.

Chris. A. Weldon, City Solicitor, for plaintiff in error.

Clarence Curtain, for plaintiff in error.

Abernethy & Folson and Schleyer & Gerhart, for defendant in error.

WILLIAMS, J. The instructions given and refused by the court of common pleas for which its judgment was reversed by the Circuit Court, raise the question whether a municipal corporation is exonerated from liability for injuries caused by an unsafe condition of a public way under its control, which it has suffered to remain after notice, when the defect arose in the execution of a plan adopted by the corporation for a local improvement. Its immunity from liability is defended here on the ground that, in the adoption of plans for local improvements, municipal bodies are in the exercise either of a legislative power, which is discretionary and not subject to judicial control, or of a judicial power, and not responsible for errors of judgment. Cases are cited in support of the proposition, some of which place the exemption from liability on one of these grounds and some on the other; but none on both. It is said in *Detroit v. Beckman*, 34 Mich. 125, that "when complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, it is apparent that the fault is with legislative action." And in *Urquhart v. Ogdensburg*, 91 N. Y. 67, it is declared that the exercise of the power to make local improvements is *quasi* judicial. The courts of these States, in numerous decisions, maintain respectively these divergent views of the grounds on which municipal corporations are not liable in such cases, but concur in holding their non-liability; and on that question they are at variance with a large number of reported cases, especially of those decided by the courts of the middle and western States. In *Blyhl v. Waterville*, 57 Minn. 115, it is held that "a municipal corporation is liable for an injury caused by having an unsafe sidewalk, the condition of which is due to the plan adopted for its construction, when the city could have remedied the defect, but did not do so." And in *Gould v. Topeka*, 32 Kans. 845, the court hold that a "city has no more right to plan or create an unsafe and dangerous condition of one of its streets than it has to plan or create a public or common nuisance." The same doctrine is maintained in Indiana, Iowa, and other States. We will not attempt a review or discussion of the cases on this subject. In their briefs, which show diligent research, counsel have collected the cases on both sides, and ably presented their different views.

Text writers on the subject lean to the side of municipal liability in such cases. In *Dillon on Municipal Corporations*, vol. 2, page 1294, under section 1024, it is said: "Does the principle that actionable negligence cannot be predicated of the plan itself (post section 1046), go so far as to exempt from liability if that plan leaves the streets in an unsafe and dangerous condition for public use? In the author's opinion this question ought to be answered in the negative." And in *Harris on Damages by Corporations* (vol. 1, page 165), that author

says: "As to the liability of a city for damages for an injury resulting from a defective plan, the decisions are not all harmonious, but the weight of authority is now perhaps in favor of holding the city liable for defects in the plan as well as in the execution of the work." And see *Elliott on Roads and Streets*, ch. 20; and *Jones on Neg. Mun. Corp.*, ch. 4, page 67.

It has been held in this State, in a number of reported cases, that municipal corporations are liable for injuries caused to property abutting on streets, by changes in their grades, notwithstanding the establishment of the grade was a lawful exercise of municipal authority, and the work was done in conformity with the plan so adopted. The court recognizes that in this class of cases it has taken ground in advance of some adjudications elsewhere, and its position is maintained on principle. The doctrine established by them has since been adopted and followed in several other States. In *Dayton v. Pease*, 4 Ohio St. 80, the city of Dayton was held liable in damages for injuries to property resulting from the fall of a bridge forming part of one of its streets over a canal, where the fall was owing entirely to defects in the plan of the bridge which had been approved by the council, and the bridge was constructed under its direction and in accordance with the plan. While the question here is not precisely the same as in that case, it is nearly so, and involves an application of the same principle. And, in view of the irreconcilable conflict of decisions elsewhere, on this question, we are at liberty to adopt such rule as will best harmonize with those of this court, and our legislation on the subject, and as to us seem most reasonable and practicable. Our statute, in express terms, places the public ways of each municipality, in its control, coupled with a positive command to keep them open, in repair, and free from nuisances. In the performance of that duty, the municipal authorities are required to remove, and keep removed from its streets, all dangerous defects, obstructions, and nuisances of every kind, as they may arise, from time to time, from any cause. There is no exception from the requirement, in favor of defects, obstructions, or nuisances which are placed, or caused to be placed, in a street, by the corporation or by its officers or agents; nor, is there any the less reason for holding the corporation liable for a disregard of its duty to remove such obstacles from its streets when placed there by its own act or the act of its officers, than there is for making it answerable for its negligence in permitting similar obstacles to remain when placed in the street by other persons. The statutory duty is ministerial in its nature, and mandatory in terms; and was imposed for the benefit of those having occasion to use the streets, so that they might use them with safety, and not for the benefit of the corporation; and ample means for its prompt and efficient performance are placed in the control of the corporation. While municipal legislation may be necessary in providing means and measures for the performance of the duty, as it is with re-

spect to many strictly ministerial duties, its performance, or the omission to perform it, is not the exercise of legislative or judicial power, nor is it discretionary.

We are of opinion, therefore, that a municipal corporation should be held liable for injuries caused by a dangerous defect or obstruction in a street or sidewalk which it suffers to remain after reasonable notice of its existence, though it arose in the construction or alteration of the street or sidewalk in accordance with a plan adopted by the municipal authorities.

We express no opinion in regard to the weight of the evidence. There was not a total lack of evidence tending to support the issues for the plaintiff, and its sufficiency is for the jury under proper instructions, and for the lower courts.

Judgment affirmed.

SHAUCK, J., dissents.

9. *For Results of an Ultra Vires Undertaking*

CLAYTON v. CITY OF HENDERSON *et als.**

103 Ky. 228. 1898

ACTION to recover damages for causing the plaintiff to have the small-pox by maintaining a pest-house near her dwelling. The city charter grants authority to "prevent the introduction of contagious diseases into the city;" "to establish and erect hospitals;" etc. The Kentucky statutes, however, section 3909 provide: "It shall not be lawful to locate or maintain any pest-house or other place intended for the treatment of eruptive diseases, or diseases which are contagious or infectious, within the corporate limits of any incorporated city or town, or within a distance of one mile of the boundary line thereof." The statute also imposes a penalty on any municipal officer who shall violate its inhibition. The pest-house maintained by the defendant city is alleged to be within one-half mile of the city boundary. Demurrer. Demurrer sustained. Appeal.

JUDGE DURELLE. . . . It is further contended on behalf of the city of Henderson that . . . the city cannot be held liable, because the act does not make the corporation responsible, but only the officers who shall violate its provisions; and further, because the act complained of, being forbidden by statute, was beyond the scope of the powers of the municipality, was ultra vires, and therefore imposed no liability upon the corporation. But in the contention that the act imposed no responsibility upon the corporation, the common law liability for establishing a nuisance which inflicts special damages upon an individual is over-

looked; and as it is not necessary that the word "nuisance" should be used in the pleading, but only that facts be stated which show the existence of the nuisance and the damage resultant therefrom, we think a cause of action has been stated against the city.

"A pest-house erected by town, municipal, or county authorities near the premises of another, injuring the health of his family or exposing them to contagious disease, is a nuisance for which an action will lie, and in the case of a county against the board or officers erecting it." *Wood's Law of Nuisances*, 2d ed., § 66.

And in *Haag v. Vanderburgh County*, 60 Ind. 511 (28 A. R. 654), suit was brought against the board of commissioners of the county, which was held to be, in legal contemplation, the county; and the court held that it was a well-recognized rule that municipal corporations are liable for torts in certain classes of cases, including nuisances, in the same manner as natural persons; referring to 2d *Hilliard on Torts* (p. 273), *Shear. & Red. on Negligence* (§ 120), 2d *Dillon's Municipal Corporations* (p. 766).

And in the contention that the acts alleged in the petition being unauthorized cannot impose a liability upon the corporation, counsel seem to confuse the liability of a municipality for unauthorized contracts with its liability for torts committed by its officers acting under its authority in a matter within the scope of its corporate powers, but in regard to which its powers have been abused. Said Chief Justice Shaw in *Thayer v. City of Boston* (19 Pick. 513), cited with approval in *McGraw v. Town of Marion* (17 R. 1258-59), in which a number of other cases upon the subject are referred to:

"The court is, therefore, of the opinion that the city of Boston may be liable in an action of the case where acts are done by its authority which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government invested with jurisdiction to act for the corporation upon the subject to which the particular act relates, or where, after the act has been done, it has been ratified by the corporation by any similar act of its officers."

The rule in this respect is admirably stated in *Dillon on Municipal Corporations*, 4th ed., § 968:

"To create such a liability, it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers as prescribed by charter or positive enactment (the extent of which powers all persons are bound, at their peril, to know); in other words, it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances."

And again in section 972:

"*Prima facie*, a municipal corporation is not liable for the trespass and wrongful acts of its officers, though done *colore officii*; but it will

clearly be liable therefor where the act, if not wholly *ultra vires* in the sense before explained, was expressly authorized by the governing body of the corporation, or where, without special authority, it was done by its officers in the scope of their duties and employment, and has been ratified by the corporation." . . .

[*Judgment reversed.*]

10. *Distinction between Independent Officers and Corporate Officers or Agents*

GROSS v. PORTSMOUTH

68 N. H. 266. 1895

CASE. To the plaintiff's declaration, — setting forth that the defendants, a municipal corporation, are the owners of a system of water-works, and by pipes laid in the ground conduct water to the dwellings of residents in the city for which they receive compensation, that in laying the pipes in 1894, on Market Street, their servants so carelessly and negligently filled the trenches in which the pipes were laid as to form a ridge in the street, making the highway defective and dangerous, and that the plaintiff, while driving on the street, by reason of the ridge, was thrown from her carriage and injured, — the defendants demurred.

Samuel W. Emery, for the plaintiff.

Ernest L. Guptill and *Calvin Page*, for the defendants.

CARPENTER, J. Unless the defendants are liable at common law the demurrer must be sustained. Laws 1893, ch. 59.

Judicial notice may be taken of the act (Laws 1891, ch. 209) authorizing the defendants "to issue water bonds, and to manage and control its water supply." *Hall v. Brown*, 58 N. H. 93, 95, 96. By its provisions the "immediate management and direction of the water-works" are vested in a board of water commissioners consisting of four persons, of whom the mayor for the time being is *ex officio* one. The three other members of the board (one of them to hold the office three years, one four years, and the other five years from February 1, 1891) are named in the act. In January, 1894, and each year thereafter, the mayor and aldermen are required to appoint a member of the board to hold the office three years from the first day of the following February. They may "appoint a superintendent of the works and such other agents and servants as they may deem necessary, and may fix their compensation.

They may make such rules and regulations for their own government and in relation to all officers and agents appointed by them as they may deem proper. They shall have the control and management of the construction and enlargement of said works, and may make all such contracts and agreements for and on behalf of the city in relation thereto as they may deem proper and advisable, and shall have full charge and control over the said works when enlarged and constructed. They shall establish rates and tolls, and prescribe rules and regulations for the use of water, and may sell and dispose of such articles of personal property connected with said works as they shall deem expedient, and may purchase such property as may be in their judgment necessary for said works and the purposes contemplated by this act." Laws 1891, ch. 209, §§ 4, 5, 6, 8.

The water commissioners are not the city's agents, but an independent board. The city cannot direct or control them in the discharge of their duties. They have exclusive authority to determine where and in what manner water pipes shall be laid, and to do all other things touching the construction, maintenance, and management of the water-works. For their misfeasance or that of their employees, the defendants are not liable, because they are not the defendant's servants. *Ball v. Winchester*, 32 N. H. 435; *Edgerly v. Concord*, 62 N. H. 8, 20; *Walcott v. Swampscott*, 1 Allen, 101; *Morrison v. Lawrence*, 98 Mass. 219, 221; *Ham v. Mayor*, 70 N. Y. 459.

The defendants have no authority, and can confer none upon their officers and agents, to do any act relating to the construction or management of the works. Their ordinance authorizing or directing their servants to lay water pipes in Market Street or elsewhere, or prescribing the manner of laying them, would be illegal and void. At common law a municipal corporation is not responsible for the acts of its agents or servants, or for their negligence in the performance of acts, that it has no power to authorize. *Edgerly v. Concord*, 62 N. H. 8, 19; *Anthony v. Adams*, 1 Met. 284; *Lemon v. Newton*, 134 Mass. 476; *McCarthy v. Boston*, 135 Mass. 197, 200, 201; *Smith v. Rochester*, 76 N. Y. 506; 2 *Dill., Mun. Corp.* § 766; *Cool., Torts*, 119. Whether the acts of which the plaintiff complains were done by the water commissioners or the defendants' servants, the declaration discloses no cause of action, and the demurrer must be sustained. The question whether the demurrer might be sustained upon another ground urged by the defendants (Laws 1893, ch. 59, § 1) is not considered.¹

¹ See, also, *Bailey v. New York*, *supra*, p. 342. A good specimen of the independent public officer is a surveyor of highways in New England. In *Walcott v. Swampscott*, 1 Allen (Mass.), 101, a town was held not responsible for an injury caused by the negligence of a laborer employed by the highway surveyor of the town. The following is quoted from the opinion:

"They [highway surveyors] are elected by towns and cities, not because they are to render services for their peculiar benefit or advantage, but because this mode of appointment has been deemed expedient by the legislature in the distribution of public duties and burdens for the purposes of government, and for the good order

and welfare of the community. They are, strictly speaking, public officers, clothed with certain powers and duties which are prescribed and regulated by statute. Towns cannot direct or control them in the performance of these duties; they cannot remove them from office during the term for which they are chosen; they are not amenable to towns for the manner in which they discharge the trust reposed in them by law; nor can towns exercise any right of selecting the servants or agents by whom they perform the work of repairing the highways. In the discharge of these general duties they are wholly independent of towns, and can in no sense be considered their servants or agents. It is only in certain specified cases, and under carefully guarded limitations, that they can bind towns by their acts."

CHAPTER X

RIGHTS AND REMEDIES OF CREDITORS

BRINKERHOFF v. THE BOARD OF EDUCATION FOR THE
CITY AND COUNTY OF NEW YORK *et als.**

37 *Howard's Practice Rep. (N. Y. Common Pleas)* 499, s. c. *Abbot's Practice* (N. Y.)
428. 1869

BEFORE DALY, F. J., BRADY and BARRETT, JJ. Action by a sub-contractor to enforce upon a public school-house in the city of New York, a lien under the Mechanic's Lien Law for labor and materials furnished by him in the construction of the building.

By the Court, DALY, F. J. I expressed the opinion in *McMahon v. The Tenth Ward School Officers, etc.* (12 Abb. 129), that a party who performed work towards the erection of a public schoolhouse in the city of New York, had a lien upon the building, which could be enforced under the acts for the better security of mechanics and others erecting buildings, or furnishing materials therefor in this city (Laws of 1851, ch. 513; of 1855, ch. 404). But the point was not taken in the case, nor necessarily involved, as the judgment was reversible upon other grounds. . . .

Since the decision in the case of *McMahon v. The School Officers, etc.*, the Court of Appeals, in *Darlington v. The Mayor of N. Y., etc.* (31 N. Y. R. 164), have considered the question how far a judgment against the city can be enforced by a levy upon and sale of property belonging to, or held in trust by it, as a municipal corporation. Chief Justice Denio, by whom the opinion of the majority of the court was delivered, held that a municipal, equally with a private corporation, may have its property taken in execution if payment of a judgment is not otherwise made; but he distinguishes as exempt from the exercise of this right, such estate, real or personal, as may by law, or by authorized acts of the city government, be devoted to public use, such as the public edifices, or their furniture, or ornaments, or the public parks, or grounds, or such as may be legally pledged for the payment of its debts. These, he holds, cannot be seized to satisfy a judgment, as these structures are public property devoted to specific public uses, in the same sense as similar structures are, in use by the State government, and though this is a distinction which appears to have been taken for the first time, it is one that when the purposes for which municipal corporations are created are considered, commends itself as founded in public necessity. . . .

Municipal corporations came into use in England in the form of boroughs, through an arrangement by which certain managers of the local community undertook to pay the yearly rent or sum due to the superior or sovereign, in consideration of which they were permitted to levy the old duties, and were responsible for the funds committed to their care. This privilege of farming their tolls or duties was afterwards confirmed to them by acts of incorporation embracing other privileges, either gradually acquired or long enjoyed in places where the Romans had introduced the *municipia*, or cities enjoying the right of local self-government. *Thompson's Essay on Municipal History*, pp. 10, 11, 12; *Palgrave's Anglo-Saxons*, pp. 6, 11; *Millar's English Government*, p. 340; *Angell and Ames on Corporations*, §§ 16, 18, 21.

Having thus the right to collect duties, and being responsible for the funds coming into their hands, it came to be recognized, very naturally, that they might on the one hand sue to enforce the payment of duties, and on the other be themselves sued to compel them to discharge the obligations they had assumed. As their municipal authority and duties gradually increased, the power to bring actions, and their liability at the suit of others, was both increased and varied. Actions by and against them are to be found as early as the *Year Books*, and the power was generally conferred specifically in the acts of incorporation; but the works of authority are barren of exact information as to the manner in which judgments against them were enforced, which may have arisen from the fact that they rarely refused to pay a judgment when recovered against them, and were always able, from the nature of their powers, to procure the means to discharge it.

In *Rex v. Gardiner* (Cowp. 86), Justice Aston says: "As to the remedy of levying a duty upon a corporation, the books all agree that it may be levied, but they differ as to the mode." But he was speaking only to the question whether a private corporation (that is, a college) could be rated for the support of the poor of a parish. It is probable that a municipal corporation might, as was held in the case of private and trading corporations, be compelled to appear, or obey decrees for the payment of money after execution issued by the common law process of *distringas*, under which the lands and goods of the corporation could be distrained, and, in the event of non-compliance, sequestered. *The Master and Wardens of the Company of Wax Chandlers*, Skin. 27; *The African Co.*, id. 84, 1 Ver. 121; *The East India Co.*, 2 id. 396; *Precs. in Chy.* 129; *The Hamborough Co., of Merchant Adventurers*, Cases in Chy. 204.

The right, however, to recover a judgment against them, would necessarily carry with it the right to enforce the payment of it. But the mode of enforcing it, so far as I have been able to find, is by no means clearly indicated.

Rolle, C. J., in the case of the *Town of Colchester* (Styles, 267), says: "If a sum of money be to be levied upon a corporation, it may be levied

upon the mayor, or upon any person being a member of the corporation." And in another case, in *Styles*, 366, the court ordered a *distringas* to levy a fine of twenty pounds, imposed after indictment, upon the inhabitants of a parish, for not keeping a bridge in repair. But I do not find in the early Abridgments of *Fitzherbert*, *Brookes*, or *Sheppard*, nor in that great repository of the common law adjudications, *Viner's Abridgment*, nor in the English treatises which I have examined, anything to indicate that judgments against municipal corporations ever were, or could be enforced by the seizure and sale of buildings or other property of the corporation devoted to public objects, such as jails, poor-houses, markets, courthouses, and other structures necessary in the local government of the place, and indispensable to enable a municipal corporation to carry out the purpose for which it is created.

There are three cases, of comparatively recent origin, all relating to the borough of Poole, a small seaport town in the south of England, in which, or in one of which, this right appears to have been recognized; but the point was not involved, and it is apparent from the report of each case, that in no one of them was the question examined, or so deliberately considered or passed upon, as to entitle it to the weight of an adjudication upon this point. This will appear from a very brief statement of these cases. [The learned judge then reviewed *Regina v. Ledgard*, 1 Ad. & El. (U. S.) 616; *Doe v. Roe*, 1 Ad. & El. (U. S.) 700; *Mayor v. Whitt*, 15 M. & W. 571.]

Chancellor Kent, in declaring that municipal corporations can sue and be sued, remarks that the judicial reports of this country abound with cases of suits against towns in their corporate capacity for debts and breaches of duty, for which they are responsible; but he says nothing as to the mode in which judgments against them in such actions can be enforced (2 *Kent*, 275, 4th ed.), and the question is one upon which the authorities in this country are by no means agreed, for in some instances it has been held that their property cannot be taken on execution issued upon a judgment against them (*Chicago v. Halsey*, 25 Ill. R. 595); while in others it has been held that it can, or the right to take it has been impliedly recognized. *Crafts v. Elliotville*, 47 Maine, 141; *Darlington v. The Mayor, etc., supra*.

In the first of these cases (*Chicago v. Halsey*, 25 Ill. R. 595), it was held by the Supreme Court of Illinois, that upon a judgment against a municipal corporation the corporate property cannot be seized and sold under execution; that the proper remedy is *mandamus* to compel a levy of taxes sufficient to enable the corporation to pay the judgment. The Superior Court of Chicago having refused to set aside an execution issued upon a judgment against the city, the Supreme Court of the State, upon appeal, reversed the decision of the court below, and directed it to enter an order quashing the execution.

"It is true," says Breeze, J., "that by the charter of the city it can sue and be sued, but it is not an inference that, if sued, and a judgment

passes against it, an ordinary writ of *fiery facias* can issue, under which its corporate property can be seized and sold. Nor is there any necessity for such writ. On a debt being ascertained by judgment against a city and a refusal to pay it, a *mandamus* can issue to compel payment, or to compel a levy of taxes sufficient to discharge the judgment," closing with the remark, "We decide this on principle."

It may be collected, as the result of this examination, that, under an execution upon a judgment against a municipal corporation, the property of the corporation *not devoted to public use*, may be taken and sold to satisfy the judgment; that *if there is no such property*, the remedy is by *mandamus*, to compel the payment of the judgment out of any money or fund under the corporate control, or to compel the raising of it by tax, when the corporation is clothed with the power to impose a tax; and if it should not be, that then the creditor of the municipal government is placed in the same condition as are the creditors of the State, or of the United States.

Property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason be equally exempt from the operation of the lien law, unless it appears by the law itself, that property of this description was meant to be included.

There is nothing in the lien law that would warrant this inference. A lien is given by the act for labor performed, or materials furnished in the building, altering, or repairing of any house or other building, upon the building and the lot of land upon which it stands, to the extent of the right, title, and interest of the owner at the time when notice of the claim was filed and served. The object of the act was to give mechanics and material men a security for the ultimate enforcement of their claim, by making it, from the time that notice of it as provided is given, a lien or incumbrance upon the property benefited. Where the lien thus attaches either party may bring the claim to a final determination, and if anything is ascertained to be due to the claimant, judgment is entered for the amount of it, which judgment may be satisfied by the sale of all the right, title, and interest, which the owner had to the property when the notice of the claim was filed and served.

When judgment is recovered in a court of record, it is a lien upon the real estate of the defendant, from the time when the lien is docketed; and when recovered in courts not of record, it becomes a lien upon the filing of the judgment in the office of the county clerk. In these cases, it is enforced as a lien only from the time of the docketing of the judgment or the filing of the transcript; but the judgment obtained by foreclosure under the lien law may be enforced as a lien against the particular property from the time of the filing and service of notice of the claim, and that constitutes the particular benefit which it was the design of the act to confer upon the laborer or material man, and is the advantage which it gives him, over ordinary creditors, as a security for the payment of the judgment he may ultimately obtain. With this exception,

the judgment he obtains is, by the express language of the act, "to be enforced in all respects in the same manner as judgments rendered in all other civil actions for the payment of money." (Laws of N. Y., 1851, p. 955, § 8.) And if judgments recovered in other actions cannot be enforced against a certain kind of property, for the reason that it is exempt from seizure and sale, upon grounds of public necessity, neither can a judgment under the lien law, which is a mere foreclosure of a security obtained by the filing and service of notice of a claim. *Cronk-right v. Thomson*, 1 E. D. Smith, 661; *Nott's New York Lien Law*, p. 63. And no such security can be obtained upon property which for reasons of public necessity cannot be taken and sold to satisfy judgments obtained in ordinary civil actions.

I think the fair construction of the lien law is, that the security contemplated by the law may be obtained upon the building upon which the labor was bestowed or the materials furnished, and upon the lot of land upon which the building stands, if the land and building could be sold to enforce a judgment in an ordinary civil action, but not otherwise. That we are not justified in holding that the legislature meant that this particular kind of creditor should have a lien upon public edifices and the right to sell them to satisfy his claim, unless the legislature has expressly said so. The reason which exempts such structures, upon the grounds of public necessity, applies as forcibly in this case, as in that of any other judgment creditor, and if all other judgment creditors are precluded from the exercise of such a right he must be considered precluded also, in the absence of any provision that would warrant us in holding that the legislature designed that his case should be an exception to the operation of a general rule, having its foundation in public necessity.

The erecting and maintaining of schoolhouses in this city for public education, is imposed as a duty upon the city by statute. Their erection, maintenance, and government are regulated by numerous statutory provisions. They are by law devoted to a public use, and therefore come within the operation of the rule above considered.

Judgment affirmed.

I dissent. G. C. BARRETT, J.

MAYOR, ETC., OF CITY OF MONROE *v.* JOHNSTON *et als.*

106 La. 350. 1901

BLANCHARD, J. The J. G. Wagner Company, a judgment creditor of the city of Monroe, caused execution to issue, and under the writ the sheriff seized a tract of land containing eighty acres, belonging to

the debtor, and also fourteen head of mules, two horses, eight wagons, and eight sets of harness; whereupon the city of Monroe sued out a writ of injunction to restrain the sale of the property. The allegation is made that the land contains a bed of gravel, and was bought by the city for the sole purpose of obtaining material to gravel and improve its streets; also that the mules, horses, harness, and wagons seized were acquired by the city for the sole purpose of hauling the gravel from the pit to the streets and distributing the same on them. It is further averred that the land and the other property mentioned have been used, since the city's acquisition thereof, solely for the purposes named, and that by means thereof useful and valuable improvements have been made on the streets. It is represented that the expense of buying the property, as well as the care and maintenance of the mules and horses, was defrayed by the city out of a fund realized from the sale of an issue of \$40,000 street improvement bonds put upon the market under the authority of law. The contention of the plaintiff is that the property seized, both real and personal, is public property, acquired and held and exercised for the public use, and therefore is not subject to seizure and sale in satisfaction of an ordinary judgment against the city. The defense is that the property seized is neither essential nor necessary to the conduct of the affairs of the municipal corporation, and hence is liable to seizure for its debts. The judgment of the court *a qua* sustained plaintiff's contention, and defendant the J. G. Wagner Company prosecutes this appeal.

Ruling: The proof appears to sustain the essential allegations of the plaintiff's petition. The streets of the city of Monroe are under the control and regulation of the city council. Their improvement is within the scope of the powers granted by the charter. It was therefore competent for the council to take steps to improve them, and to this end to devise the ways and means therefor, and to determine the method and manner in which the work should be done. In this instance the council decided to gravel certain streets. It could have let the work by contract, or it could have purchased the gravel, and hired conveyances and teams for its delivery and distribution, or it could do as it did do, — purchase a gravel pit and an outfit of wagons and teams for hauling the gravel. Either method employed would have been in execution of a public purpose, and therefore legitimate. The land and the outfit needed for opening the gravel pit on it, for getting out the gravel, and for hauling and distributing it on the streets, is property, which, while not essential to the existence of the corporation, is necessary to the useful and proper exercise of its functions, and to deprive the corporation of the same would be to hinder it in one of the functions contemplated by its charter, to wit, the care and improvement of the streets of the city. *City of New Orleans v. Home Mut. Ins. Co.*, 23 La. Ann. 61. Such property, so acquired, dedicated and used, is not subject to seizure at the hands of the judg-

ment creditors of the city. *Klein v. City of New Orleans*, 99 U. S. 149; *Meriwether v. Garrett*, 102 U. S. 472, 518, 525. Whether or not property held as public property is necessary for the public use is a political, rather than a judicial, question. *Pickett v. Brown*, 18 La. Ann. 562; *Police Jury v. Foulhouze*, 30 La. Ann. 67.

Judgment affirmed.

PETERKIN v. NEW ORLEANS

2 Woods (U. S. Cir. Ct.), 100. 1875

HEARD on motion to dissolve attachment. The plaintiff, being the holder of certain bonds issued by the city of New Orleans in aid of the Opelousas Railroad and of the Jackson Railroad, and the bonds having become due and remaining unpaid, had reduced the same to judgment in this court.

In pursuance, as it is claimed, of the original act which authorized the issue of the bonds, the city had levied a tax to pay the interest thereon, and a fund for this purpose, amounting to \$105,000, had been deposited by the city in the Louisiana National Bank. It was deposited in the bank to the credit of the fund for the payment of the interest on the bonds, but was not sufficient to pay the interest on all the bonds.

The plaintiff having, as stated, recovered a judgment both for the principal and interest due on his bonds, had attached this fund and served notice of garnishment upon the Louisiana National Bank. The motion was to dissolve this attachment.

B. F. Jonas, City Attorney, for the motion.

T. J. Semmes, contra.

WOODS, CIRCUIT JUDGE. It is claimed in behalf of the city that the taxes and public revenues of a municipal corporation cannot be seized under execution against it, and that the doctrine of the inviolability of the public revenues by the creditor is maintained, although the corporation is in debt and has no means of payment but the taxes which it is authorized to collect. *Dillon, Mun. Corp.* § 64; *Edgerton v. The Third Municipality*, 1 La. An. 435; *Hart v. Same*, 6 *id.* 571.

This, as a general rule, is conceded; but it is claimed that the circumstances of this case make it an exception.

1. It is said that the city having deposited this money in a bank, the bank has thereby become the debtor of the city, and the fund has lost its distinctive character as public revenue and become simply a debt due the city from the bank, and subject to garnishment by any creditor of the city. In support of this view the cases of *Stetson v. Gurney*, 17 La. 162, and *Norris v. Henry*, 26 La. An. 625, are cited, where it is held that money deposited in a bank by an agent in his own

name cannot be identified, and becomes a debt due the depositor from the bank, and is not a debt due the principal.

This argument applies to all the funds of the city raised by taxation for all purposes. So that if we give this theory full force, it follows that whenever a municipal corporation, either from necessity or as a matter of convenience, deposits its revenues in a bank to be drawn upon for public uses, no matter to what purposes appropriated, they are liable to be seized by its creditors; that funds for feeding prisoners, sustaining hospitals, lighting the streets, keeping a supply of water for the extinguishment of fires, paying the police, etc., are all subject to be appropriated by any enterprising creditor who chooses to make the necessary effort. If funds raised for the payment of interest can be seized because the city has deposited them in a bank, it follows that funds raised for any of the other purposes named may also be seized.

I do not think the manner or place in which the public revenues of a municipal corporation are kept divests them of their public character, or subjects them to be diverted from the purposes for which, and for which only, the law authorized them to be collected. In my judgment, a municipal corporation stands in a different plight from an individual in such a case. The officers of a city are charged with the execution of a great public trust, on which depend the comfort, safety, lives, and property of the inhabitants, and cannot, by the manner in which they keep the public revenues, subject them to seizure by the public creditors, and thus defeat the very purposes for which the municipal body was created. The fact, therefore, that the city made the Louisiana National Bank the depository of its public revenues, does not subject them to seizure and garnishment.

2. It is claimed that the law authorizing the city to issue the bonds held by plaintiff, only authorized the city to levy a tax to pay the interest thereon until their maturity; that the fund attached was for interest on the bonds after maturity, and is therefore property of the city which is not applicable by law to any specified purpose, and is therefore subject to seizure by any creditor who has a judgment against the city.

But the law does not so read. It provides that "a special tax on real estate and slaves shall be levied in January of each year sufficient to pay the annual interest on said bonds, . . . provided that no levy of a tax for the payment of interest on said bonds shall be made after the payment of dividends of 6 per cent per annum on the stock of the company held by the city." Under this act, the authority to levy a tax for the payment of the interest upon the bonds is just as clear, and the duty just as imperative, after the maturity of the bonds as before, unless the stock for which the bonds were issued pays dividends of 6 per cent, which is not and never has been the case. If the city refused to levy a tax for interest after the maturity of the bonds, I think a bondholder who had reduced his bonds to judgment might have the writ of *mandamus* to compel the city to levy and collect the tax. The collection

of the money seized was, therefore, authorized by law. It was collected for a special purpose, and it cannot be diverted from that purpose by the vigilance and enterprise of the city's creditors. The officers of the city could be compelled by *mandamus* at the instance of creditors having judgments on their bonds, to apply the funds so raised to the payment of interest *pro rata* on all the bonds of this class.

It therefore follows that no single creditor has the right to seize the whole fund for his sole benefit and apply it to the payment of the principal as well as the interest of his debt.

This fund must be applied to the purpose for which the law authorizes its collection, and no other. The attachment must therefore be dissolved.

GORDON v. THORP *et ux.**

53 S. W. Reporter (Texas Civil Appeals), 358. 1899

TRESPASS to try title. The property in dispute is residence property in the city of Sherman, which was sold for taxes and bid in by the city at the tax sale for the amount of the taxes. Later the city recovered judgment against the prior owner in an action of trespass to try title; and afterward, in 1896, sold the property to the defendants for the amount of the taxes and costs, and gave a deed to defendants which the plaintiff claims did not convey the entire parcel. In July, 1898, the property was levied on and sold as property of the city, under an execution issued against the city on a judgment obtained by one Roach. The plaintiff claims title as purchaser at the execution sale. The lower court rendered judgment for the plaintiff for the portion of the land not included in the deed from the city to the defendants.

Both parties appealed.

Gordon and Wilkins, for plaintiff.

Gallaway & Templeton, and *Sidney Wilson*, for defendants.

FINLEY, C. J. [After holding that a judgment rendered in 1897 in a suit to which the city and the defendants were parties, and in which the city made no claim to the land, established defendant's title to the whole parcel conclusively.]

The facts, as above recited, show that the city bid in this land for taxes due the city, and thereafter recovered judgment for the land, based on this tax sale. It is not shown what particular taxes were due, for which the land was sold, and we must presume that it was taxes levied for the purposes of furnishing current revenue necessary for the operation and conduct of the city government. If it should be conceded that the city owned the lot at the time of the levy and

sale under execution, then the question arises whether the property was subject to be seized and sold under execution. We think it fairly well established in this State that an execution may lawfully run against a city. Rev. St., Art. 792, prohibits the issuance of execution against a county. By Art. 2399, Rev. St., the property of counties, cities, and towns, owned and held only for public purposes, is exempted from execution. It is fair to presume that, if it had been intended by the legislature that execution should not run against cities, it would have been so declared. *City of Laredo v. Nalle*, 65 Tex. 359; *Same v. Benavides* (Tex. Civ. App.), 25 S. W. 482. But it does not necessarily follow that execution may be levied upon any and all property of the city not expressly exempted by statute. *City of Sherman v. Williams*, 84 Tex. 422. It seems quite firmly established that the taxes and public revenues of such municipal governments are not subject to seizure and sale. 1 *Dill. Mun. Corp.* (4th ed.) § 100; 15 Am. & Eng. Enc. Law, 1074. It may be the correct doctrine that property owned by such municipalities to which there are attached no public character or uses, and which is held only for profit, should be subject to execution. 2 *Dill. Mun. Corp.* (4th ed.) § 576. It is held that taxes due the city cannot be seized, either in the treasury or when in transit to it; that judgments rendered for taxes, and the proceeds of such judgments, cannot be seized. 1 *Dill. Mun. Corp.* (4th ed.) § 100, and notes of cases. In the *Williams Case*, *supra*, it was held that residence property turned over to the city in lieu of certain taxes stood in the place of the tax money, and could not be seized and sold under execution. If taxes cannot be garnished before payment, nor when on deposit, and if judgments for taxes and the proceeds of such judgments may not be reached and subjected to the payment of the debts of the city, it would seem illogical to hold that a piece of property acquired in pursuing the lawful mode of enforcing payment of taxes should be held subject to seizure. Instead of collecting the taxes in money, which would not be subject to seizure, the city is forced to take title to the property, and, in the natural course of things, must sell the property in order to obtain its necessary revenue. Would it not seriously affect the public revenues to make such property subject to seizure? We think the principles announced in the *Williams* decision lead to the conclusion that property purchased by a city in the collection of its ordinary taxes stands in the place of such taxes, and should be held not subject to execution. If this view of the question be sound, then appellant could have acquired no title under the execution sale. The judgment is reversed, and will be here rendered that appellant take nothing by this suit, and that appellees go hence without day, and recover all costs.

DARLING *et al.* v. THE MAYOR AND CITY COUNCIL OF
BALTIMORE ‡

51 Md. 1. 1878

THIS appeal was taken from a decree of the court below making perpetual an injunction to restrain the appellants from levying an execution, in the nature of a *fi. fa.*, upon the property held and owned by the appellee.

ALVEY, J. . . . The alleged ground of fraud and surprise failing the appellee, the next proposition presented and relied on is, that an execution cannot be rightfully issued against a municipal corporation, on a judgment for debt or damages recovered against it. And whether such proposition, in the unqualified form stated, can be maintained, is a question of more than ordinary importance, and one in regard to which there exists a considerable diversity of opinion among those who have had occasion to consider it, in the courts of some of our sister States. The question is now presented to this court for the first time, and we must decide it, not upon precedent, but upon such reason and principle as we take to be applicable and controlling in the case.

As we understand the counsel for the appellants, it is not contended that an execution could be issued against a municipal corporation and be levied upon property owned or used by it for purely public purposes; such as a courthouse, jail, alms-house, city or town hall, police station-houses, market-house, fire-engines, etc. But it is contended that municipal corporations may hold, and that Baltimore City does hold, property in a private or *quasi* private character, not necessary to the execution of the public municipal functions of the corporation, and that such property is liable to execution, on a judgment recovered against the corporation, in the same manner that it would be in the hands of an individual judgment debtor.

The corporation of the city of Baltimore, by its charter (2d vol. Code, Art. 4, §§ 1 and 2), is declared to be entitled to "purchase and hold real, personal, and mixed property, or dispose of the same for the benefit of said city;" and that "all the property and funds of every kind belonging to, or in possession of the city of Baltimore, are vested in the said corporation; and the said corporation may receive in trust, and may control for the purposes of such trusts, all money or other property which may have been, or shall be, bestowed upon such corporation by will, deed, or in any other form of gift or conveyance, in trust for any general corporation purpose, or in aid of the indigent and poor, or for the general purposes of education, or for charitable purposes of any description within the said city; and the said corporation may

lease or otherwise dispose of any property belonging to the said city," etc.

As has been correctly said, a municipal corporation like the city of Baltimore is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. *United States v. Balto. & Ohio R. R. Co.*, 17 Wall. 322; *Mayor, etc., of Balto. v. Police Board*, 15 Md. 376, 462. It is therefore incorporated for public and not private objects; and it is invested with privileges and allowed to hold property for the purposes mentioned in its charter. And in construing the power of the city of Baltimore to hold property under its charter, it was said by the Supreme Court, in the case of *McDonogh v. Murdock*, 15 How. 367, 413, that "All the property of a corporation like Baltimore is held for public uses, and when the capacity is conferred or acknowledged to it to hold property, its destination to a public use is necessarily implied." It is true, there is a distinction taken, and, for some purposes, well maintained by the authorities, between property acquired for public municipal purposes exclusively, which is vested in or appertains to the corporation in its public, political, or municipal character, and which may be essential to the complete performance of its public functions, and property acquired and held by it not essential to the discharge of ordinary public municipal functions, but for the ease and accommodation of the public within the corporate limits. For instance, the supply of water or gas light to the entire population of a city is not essentially a public municipal function; for the supply of water or gas may be furnished by an independent corporation or by an individual as well as by the municipal corporation itself. It is no part of the duty of the State, through its municipal organizations, to supply these things to the people. Yet it is a common thing for the corporations of cities and towns to be clothed with authority to construct works at great cost, and the cost to be defrayed by taxation, for the supply of both water and gas to the population. So, such corporations may hold wharves and other property for the facility and encouragement of trade; though all such interests are generally acquired and held under special grants of power. And while property thus held may yield gain and profit to the city, it subserves the convenience and is for the accommodation of the public. As illustrative of the distinction stated between property held as purely public, and used only for those purposes of municipal government in which the State is interested, and property held by such corporation not so used, the case of *Rittenhouse v. The Mayor, etc., of Baltimore*, 25 Md. 336, and the cases therein referred to of *Bailey v. The Mayor, etc., of New York*, 3 Hill, 531; *Master-ton v. The Mayor, etc., of Brooklyn*, 7 Hill, 61; and *The Western Saving Fund Society v. Philadelphia*, 31 Penn. St. 175 and 185, may be consulted. It is in view of the distinction maintained by these authorities, and several others that might be referred to, that it is contended that an

execution may issue on a judgment against the corporation, and be levied on such property as the corporation may hold in what is supposed to be its *quasi* private character.

But, notwithstanding the distinction just stated, all the property held by the corporation is, as we have seen, when considered in an enlarged sense, held for public uses and benefits. It is not pretended, of course, that it would be competent, under an execution against the corporation, to seize any property held in trust by it; and all other property that it holds, not used in the exercise of its public municipal functions, is held for the general benefit and advantage of the population subject to the municipal jurisdiction. In the case of the *United States v. The Balto. & Ohio R. R. Co.*, 17 Wall. 322, before referred to, it was held that the city funds invested in a loan to the railroad company were exempt from taxation, under the United States revenue law, upon the distinct grounds that the loan itself was a municipal act, and that the money due the city was public municipal property; and as the municipal corporation was an agency, and a part of the State governmental power itself, it could not therefore be taxed. But without saying that all the property held by the city is of a strictly municipal character, that is to say, essential to the performance of public municipal functions, yet, if the city funds invested in a loan to a railroad company can be so far regarded as public property, because belonging to a municipal corporation, as to be exempted from taxation, *a fortiori* should that property and all other property held by the municipality be exempt from execution on judgment against the corporation. Indeed, it would be attended with the most serious consequences, and involve the greatest amount of inconvenience to lay it down as a rule that any property belonging to a municipal corporation, not actually used in the discharge of its public functions, could be levied upon and sold under ordinary execution, as upon judgment against a private corporation. Both upon principle and the reason of the thing, therefore, we conclude that an execution on judgment against a municipal corporation will not lie.

And we thus conclude the more readily because the law does not leave the creditor without ample remedy against the corporation. By the Act of 1876, ch. 367, it is provided that any municipal corporation in this State, against which there may be a judgment recovered in a court of law, shall have power to levy a sum of money upon the assessable property of such municipality sufficient to pay such judgment. And for the purposes of the remedy in such cases, a judgment rendered by a justice of the peace may well be regarded as a judgment rendered by a court of law. It cannot be supposed that the legislature designed to exclude such judgments from the purview of the act. And it being made the duty of the corporation or those in control of its government to levy a tax for the payment of the judgment, if refused to be performed, that duty can and will be enforced by *mandamus*. *Watts v. President*,

etc., of Port Deposit, 46 Md. 500; *Supervisors v. United States*, 4 Wall. 435; *City of Galena v. Amy*, 5 Wall. 705.

That part of the decree appealed from which makes perpetual the injunction against all proceeding under the execution is affirmed; but that part of the decree which forbids and enjoins all further proceedings upon the judgment against the appellee must be reversed.

Due Process form of Leg. to compel an inc. to levy a tax
Nebraska 14 Cal. R. 409-428

FIELD, J., IN MERIWETHER v. GARRETT

102 U. S. 472. 1880

BUT while the charter of a municipal corporation may be repealed at the pleasure of the legislature, where there is no inhibition to its action in the constitution of the State, the lawful contracts of the corporation, made whilst it was in existence, may be subsequently enforced against property held by it, in its own right, as hereafter described, at the time of the repeal. In this respect its position is not materially different from that of a private individual, whose property must, upon his decease, go to the satisfaction of his debts before those who succeed to his rights can share in its distribution. . . .

What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the State: In its streets, wharves, cemeteries, hospitals, courthouses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use. The dissolution of the charter does not divest the trust so as to subject property of this kind to a liability from which it was previously exempt. Upon the dissolution, the property passes under the immediate control of the State, the agency of the corporation then ceasing. 2 *Dillon, Mun. Corp.* §§ 445, 446; *Schaffer v. Cadwallader*, 36 Pa. St. 126; *City of Davenport v. Peoria Marine & Fire Insurance Co.*, 17 Ia. 276; *Askins v. Commonwealth*, 1 Duv. (Ky.) 275; *The President, &c., v. City of Indianapolis*, 12 Ind. 620.

In the third place, we say that taxes previously levied, but not col-

*not prop
held in trust
for private
charity
for publ
purposes*

lected on the dissolution of the corporation, do not constitute its property; and in the absence of statutory authority they cannot be subsequently collected by a court of equity through officers of its own appointment, and applied to the payment of the creditors of the corporation. Taxes are not debts. It was so held by this court in the case of *Oregon v. Lane County*, reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States — and we believe in Tennessee — an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *City of Augusta v. North*, 57 Me. 392; *City of Camden v. Allen*, 2 Dutch. (N. J.) 398; *Perry v. Washburn*, 20 Cal. 318. Nor are they different when levied under writs of *mandamus* for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. The writs of *mandamus* only require the officers of assessment and collection to obey existing law. In neither case are the taxes liens upon property unless made so by statute. *Philadelphia v. Greble*, 38 Pa. St. 339; *Howell v. Philadelphia*, *id.* 471; 2 *Dillon, Mun. Corp.* § 659. Levied only by authority of the legislature, they can be altered, postponed, or released at its pleasure. A repeal of the law, under which a tax is levied, at any time before the tax is collected, generally puts an end to the tax, unless provision for its continuance is made in the repealing act, though the tax may be revived and enforced by subsequent legislation. We say generally, for there are some exceptions, where the tax provided is so connected with a contract, as the inducement for its execution, that the courts will hold the repeal of the law to be invalid as impairing the obligation of the contract. It is not of such taxes, constituting the consideration of contracts, that we are speaking, but of ordinary taxes authorized for the support of government, or to meet some special expenditure; and these, until collected, — being mere imposts of the government, created and continuing only by the will of the legislature, — have none of the elements of property which can be seized like debts by attachment or other judicial process and subjected to the payment of creditors of the dissolved corporation. They are in no proper sense of the term assets of the corporation. They are only the means provided for obtaining funds to support its government and pay its debts, and disappear as such means with the revocation of the charter, except as the legislature may otherwise provide. When they are collected, the moneys in the hands of the collecting officer may be controlled by the process of the courts, and applied by their direction to the uses for which the taxes were levied; but until then there is nothing in existence but a

law of the State imposing certain charges upon persons or property, which the legislature may change, postpone, or release, at any time before they are enforced. So long as the law authorizing the tax continues in force, the courts may, by *mandamus*, compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; but when the law is gone, and the office of the collector abolished, there is nothing upon which the courts can act. The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity, and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its sub-divisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced. . . .

When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by *mandamus* against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if those authorities possess no such power, or their offices have been abolished and the power withdrawn, the remedy of the creditors is by an appeal to the legislature, which alone can give them relief. No Federal court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the Federal court, it cannot seize the power which belongs to the legislative department of the State and wield it in their behalf.

To return to the question propounded: What is the property of a municipal corporation which, on its dissolution, the courts can reach and apply to the payment of its debts?

We answer, it is the private property of the corporation, that is, such as it held in its own right for profit or as a source of revenue, not charged with any public trust or use, and funds in its possession unappropriated to any specific purpose. In this respect the position of the extinct corporation is not dissimilar to that of a deceased individual; it is only such property as is possessed, freed from any trust, general or special, which can go in liquidation of debts.

The decree of the Circuit Court proceeding upon a different theory of its control over the uncollected taxes of the repealed corporation, and of the property which could be applied to the payment of its debts, cannot be maintained.

On another ground, also, the decree is equally untenable. It adjudges that "all the property within the limits of the territory of the city of Memphis is liable, and may be subjected to the payment of all the debts" for which the suits are brought, and that "such liability shall be enforced thereafter, from time to time, in such manner" as the court may direct.

In no State of the Union, outside of New England, does the doctrine obtain that the private property of individuals within the limits of a municipal corporation can be reached by its creditors, and subjected to the payment of their demands. In Massachusetts and Connecticut, and perhaps in other States in New England, the individual liability of the inhabitants of towns, parishes, and cities, for the debts of the latter, is maintained, and executions upon judgments issued against them can be enforced against the private property of the inhabitants. But this doctrine is admitted by the courts of those States to be peculiar to their jurisprudence, and an exception to the rule elsewhere prevailing. Elsewhere the private property of the inhabitants of a municipal body cannot be subjected to the payment of its debts, except by way of taxation; but taxes, as we have already said, can only be levied by legislative authority. The power of taxation is not one of the functions of the judiciary; and whatever authority the States may, under their constitutions, confer upon special tribunals of their own, the Federal courts cannot by reason of it take any additional powers which are not judicial.

CHAPTER XI

STATE CONTROL OF MUNICIPAL AFFAIRS

1. *Contracts*NEW ORLEANS *et al.* v. CLARK †

95 U. S. 644. 1877

MR. JUSTICE FIELD. This was an action upon several coupons for interest annexed to bonds issued by the late city of Carrollton, in Louisiana, to the Jefferson City Gas-Light Company, a corporation created under the laws of that State, for laying gas pipes through certain streets of the city, and introducing gas for the use of its citizens. The bonds were indorsed by the president of the company, with its guaranty, for the payment of their principal and interest. . . .

The bonds were issued pursuant to an ordinance of the city, which provided for the payment of the interest thereon, but made no provision for the payment of the principal; and for this omission, and because they were issued in aid of a private corporation, their validity was questioned by the city of New Orleans, upon which the liabilities of Carrollton were cast upon its annexation to that city; and as it was contended in answer to this position that the legislature had subsequently, in the act of annexation, legalized the issue, the power of the legislature to do this was denied, but the Circuit Court held that the legislature possessed the power; and the city of New Orleans was adjudged bound to pay the bonds.

The record shows that the bonds were issued after the work had been done for which the contract was made and the gas had been introduced into the city, and that they were transferred to the plaintiff for a valuable consideration. . . .

The invalidity of the bonds was asserted, as already stated, on two grounds: first, that they were issued in aid of a private corporation; and, second, that the city of Carrollton, in issuing them, created a debt, without providing in the same ordinance the means of paying its principal. The first of these grounds is not one which affects the validity of the bonds. A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort, and convenience of its citizens; and, though such works may be used by the corporation for its own gain, yet, as they advance the

Rep. Control

12 Mc Debt securities issued

73 Taxes not in rev

74 Mode of exercise of control

76 Control of the city

77-8 Operation of the city

79 Confusion of the city

public good, the corporation may be properly aided in their construction by the city; and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way. The bonds here were not given to the company as a gratuity, but for a valuable consideration; and if the company failed to pay them at maturity, and their payment was made by the city, the gas-works were to become the property of the city.

The second of these grounds is not without force. An act of the legislature of Louisiana, passed in March, 1855, had declared that the constituted authorities of incorporated towns and cities in the State should not thereafter "have power to contract any debt or pecuniary liability, without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt or contract." This enactment imposed a restriction upon the creation of liabilities by municipal bodies, which could not be disregarded. It was intended to keep their expenditures within their means; and its efficacy in that respect would be entirely dissipated, if debts contracted in violation of it were held legally binding upon the municipalities.

Assuming, then, that the bonds were invalid for the omission stated, they still represented an equitable claim against the city. They were issued for work done in its interest, of a nature which the city required for the convenience of its citizens, and which its charter authorized. It was, therefore, competent for the legislature to interfere and impose the payment of the claim upon the city. The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured. The power of the legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on technical grounds, would seem to be clear. Instances will readily occur to every one, where great wrong and injustice would be done if provision could not be made for claims of this character. For example, services of the highest importance and benefit to a city may be rendered in defending it, perhaps, against illegal and extortionate demands; or moneys may be advanced in unexpected emergencies to meet, possibly, the interest on its securities when its means have been suddenly cut off, without the previous legislative or municipal sanction required to give the parties rendering the services or advancing the moneys a legal claim against the city. There would be a great defect in the power of the legislature if it could not in such cases require payment for the services, or a reimbursement of the moneys, and the raising of the necessary means by taxation for that purpose. A very different question would be presented, if the attempt were made to apply the means raised to the payment of claims for which no consideration had been received by the city.

The act of 1874, which annexed Carrollton to New Orleans, provided

that all property, rights, and interests of every kind of the former city should be vested in the latter, and that the debts and liabilities of Carrollton, "including the funding and improvement bonds, and the bonds issued to the Jefferson City Gas-Light Company, and known as gas bonds," should be assumed and paid by the city of New Orleans; and that city was in terms declared liable therefor. Independently of this legislation, the liabilities of Carrollton would have devolved with its property upon New Orleans on the annexation to that city, so far, at least, that they could be enforced against the inhabitants and property brought by the annexation within its jurisdiction. *Broughton v. Pensacola*, 93 U. S. 266. Equitable claims which had existed against the dissolved city would continue as before, and be equally subject to legislative recognition and enforcement, or their payment might be required, as in this case, by the act of annexation. The power of taxation which the legislature of a State possesses may be exercised to any extent upon property within its jurisdiction, except as specially restrained by its own or the Federal Constitution; and its power of appropriation of the moneys raised is equally unlimited. It may appropriate them for any purpose which it may regard as calculated to promote the public good. Of the expediency of the taxation or the wisdom of the appropriation it is the sole judge. The power which it may thus exercise over the revenues of the State it may exercise over the revenues of a city, for any purpose connected with its present or past condition, except as such revenues may, by the law creating them, be devoted to special uses; and, in imposing a tax, it may prescribe the municipal purpose to which the moneys raised shall be applied. A city is only a political subdivision of the State, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent. *The People ex rel. Blanding v. Burr*, 13 Cal. 343; *Town of Guilford v. Supervisors of Chenango County*, 18 Barb. (N. Y.) 615, s. c. 13 N. Y. 143.

The Constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law, — no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not

apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion.

Judgment affirmed.

GOVERNOR, ETC., USE OF THE TRUSTEES OF THE POOR,
ETC., v. GRIDLEY

[*Walker (Miss.)*, 328. 1829

TURNER, C. J. The plaintiff recovered a judgment in the Circuit Court of Adams County, against Green and Nevitt, sureties of John Hankinson, tax collector of said county, and sued out execution thereon, on which execution the sheriff made the following return to wit: "stayed by Act of Assembly."

The plaintiff's attorney moved the court, for a fine on the sheriff, under the Act of 1828, and also for judgment against the sheriff, under the 49th section of the execution law of 1822, Rev. Code, p. 210.

The defendant resists these motions on the ground that the General Assembly at its last session, gave to the defendants a stay of execution until the — day of November, 1829.

The plaintiff's counsel contends that the act in question is unconstitutional and void, inasmuch as the suit was brought for the use of a corporate body, having a vested right, which the legislature can, in no respect, destroy, delay, or impair.

The court is of opinion that the corporation in question is a *public* one and under legislative control; that the legislature has the power to regulate the mode of collecting the debt in question, and that no principle in the constitution has been violated by the provisions of the act in question; that the sheriff was bound to obey the act, and consequently that his return on the execution is a lawful return.

It is therefore considered that the motions in these cases be overruled at the costs of the plaintiff.

STATE OF MARYLAND, USE OF WASHINGTON COUNTY v.
THE BALTIMORE AND OHIO RAILROAD COMPANY *

25 Md. (12 Gill & Johnson) 279. 1842.

APPEAL from Frederick County Court. This was an action of debt instituted by the appellants on the first February, 1841, in the *debet* and *detinet*, for the sum of one million of dollars.

The plaintiffs claimed to recover the sum declared for, under the fifth section of the Act of 1835, chap. 395, passed on the fourth June, 1836, entitled "an Act for the promotion of internal improvement." It enacted in substance that if the Chesapeake and Ohio Canal Company and the Baltimore and Ohio Railroad Company should "approve, assent and agree to the several provisions of this Act" and should certify their assent in a manner provided, the Treasurer of the Western Shore of Maryland should subscribe to the capital stock of each of those corporations, the sum of three millions of dollars, and should pay for the same in the manner and upon the conditions specified; that the Baltimore and Ohio Railroad Company should so locate and construct its railroad as to pass through Cumberland, Hagerstown, and Boonsborough, declaring that "if the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in this Act, then and in that case they shall forfeit one million of dollars to the State of Maryland for the use of Washington County."

The plaintiff alleged that the defendant had not so constructed and located its road as to pass through Cumberland, Hagerstown, and Boonsborough, as directed by the said fifth section.

The defendant pleaded, first, *nil debet*; second, that since the last continuance, the legislature of Maryland had passed an Act set forth in the plea, which enacted substantially that so much of the Act of 1835 as made it the duty of the Railroad Company to construct its road to pass through Hagerstown and Boonsborough was thereby repealed; that the forfeiture of one million of dollars was thereby remitted and released; and that any suit instituted to recover the same was thereby declared discontinued and of no effect.

In the county court, facts were agreed upon and final judgment was entered for the defendants. The plaintiffs appealed to this court. The questions decided by this court render it unnecessary to publish the agreement of facts.

Jervis Spencer, for the appellant. . . .

Washington County is a party to that contract; she is really and beneficially interested. It is for her particular benefit. It resembles an agreement made between A and B, for the benefit of C, who may sue *suo jure*. A consideration need not be paid by the beneficiary. A benefit moving to the Railroad Company is sufficient to bind her at law.

Price, in continuation, for the appellants. . . .

The penalty imposed by the Act of 1835, is not for a political offense, nor for a criminal act, nor *in terrorem*. It arises upon contract, and is stipulated damages, intended to be paid.

Nelson, for the appellee.

R. Johnson, also for the appellees. 1. The Act of 1835 constitutes a penalty.

2. If a penalty, then under the control of the legislature.

3. If a contract, then the party for whose use the contract was entered into is not a party to it; or if a party, has no such interest as is protected by the Constitution of the United States, or State of Maryland, or the first principles of the social compact.

4. If a contract, then at law under the control of the legislature of Maryland, because of the public character of the *cestui que use* — Washington County — without question so far as that county is concerned.

John Sergeant, in reply.

STEPHEN, J., delivered the opinion of this court. This is an action of debt, instituted in the name of the State of Maryland, for the use of Washington County, to recover the sum of one million of dollars, claimed by the county from the Baltimore and Ohio Railroad Company, for an alleged violation of contract contained in one of the provisions of its charter.

In bar of any recovery in this suit, the appellee has pleaded, that nothing is due to the county; and also, the Act of Assembly annulling the obligation and releasing the forfeiture, in virtue of which the said sum of money is alleged to be due.

The controversy between the parties is one of considerable magnitude, not only as regards the sum involved in the litigation, but on account of the aspect it has assumed as a question involving grave considerations of constitutional law. The case has been argued with great legal learning and ability by the distinguished counsel employed to advocate the cause of the respective parties, and the court have derived no small degree of assistance in coming to the result at which they have arrived, from the light which has been shed upon the subject in the course of the discussion.

[The court then decided that, according to the true construction of the Act of 1835, the provision for the payment of one million of dollars was one for a penalty, and was, therefore, subject as to its enforcement to the will of the legislature.]

But supposing that the views heretofore expressed upon the merits of this controversy are not well founded, and that it is to be deemed a case of contract and not penalty; is it a contract coming within the purview of the Constitution of the United States, which prohibits a State from passing any act impairing the obligation of contracts, and was the Act of 1840 therefore a nullity? In order to arrive at a just

conclusion upon that subject, it is material to consider who are the contracting parties, and in what relation does the *cestui que use* stand to the legal plaintiff upon the record? The contracting parties are the State on the one part, and the railroad company on the other. The consideration of the contract was the franchises and privileges derived by the company from the State, and the *cestui que use* is one of the counties of the State, claiming an interest incidentally in her political character and capacity, in virtue of one of the provisions contained in that contract? The State, for reasons which she deemed sufficient, has thought proper, by an Act of her legislature, to annul the contract and release the claim of the *cestui que use*, which this action has been instituted to enforce; and it is now contended on the part of the appellant in support of it, that such legislative act is a nullity, because it violates that great moral sanction of the Constitution, which declares that no State shall pass any law which impairs the obligation of contracts. To declare an act of a co-ordinate department of the government an unwarrantable assumption or usurpation of power, because it is a violation of a constitutional prohibition, is an exercise of the judicial office, of a grave and delicate nature, which never can be warranted but in a clear case; but however painful and unpleasant the task may be, it is a duty enjoined upon the courts of justice sometimes to execute it, under the solemn sanctions of an oath, which they are not at liberty to overlook or disregard. In the case, however, which we now have to decide, we have no such duty to perform, because we think the legislature have not transcended their constitutional limits in passing the Act of 1840, by which they released the claim of the plaintiff, and discontinued the action which was brought to enforce it. Washington County, by which the claim is attempted to be enforced, is one of the public territorial divisions of the State, established for public political purposes, connected with the administration of the government. In that character she would receive the money as public property, to be used for public purposes only, and not for the use of her citizens in their private individual characters and capacities. In that relation they would have no immediate interest, and could assert no title. She is one of the instruments of the government, invested with a local jurisdiction to aid in the administration of public affairs, and may be emphatically termed a part of the State itself. If then it be public, and not private property, it would seem to be completely at the disposal of the government, and the Act of 1840 was nothing more than a rightful exercise of legislative power. . . .

In 1804, the Justices of the Levy Courts of the respective counties were incorporated, and all property belonging to any county, or appropriated to any county use or purpose, was vested in them for the benefit of the county; and by an Act passed in 1829, chapter 21, commissioners are directed to be chosen biennially by the voters of the county of Washington, who are likewise incorporated, and in whom

the same powers and privileges are vested, as were given to the Justices of the Levy Courts by the Act of 1804, and all property belonging to the county or appropriated to its use, is in like manner vested in the said commissioners. The money then for which this suit has been brought, if recovered, would be vested in this body corporate, as a public corporation, for public or county purposes, and would not be private property, belonging to the citizens of the county in their individual rights or private capacities. It would be held by the commissioners as public property given by the State to be used only under legislative authority, for public purposes, and be subject in their hands, in all respects whatsoever, to the controlling power and jurisdiction of the legislature. . . .

Judgment affirmed.

PEOPLE OF THE STATE OF NEW YORK v. FISHKILL
AND BEEKMAN PLANK ROAD COMPANY†

27 Barb. (N. Y.) 445. 1857

THIS was an action in the nature of a *quo warranto* brought by the attorney general, in the name of the people, for the purpose of forfeiting the defendants' charter. It was tried at the circuit in Dutchess County, upon issues which were submitted to a jury. Upon their verdict, in favor of the plaintiffs, the counsel for the people moved for judgment; whereupon the following opinion was delivered.

G. Dean, for the plaintiffs.

John Thompson and *H. A. Nelson*, for the defendants.

EMOTT, J. Some of the questions discussed upon the present argument have been examined in a former action, brought against these defendants by the town of Fishkill. In that case I came to the conclusion that so much of the act passed April 15, 1854, entitled "An act to release the Fishkill and Beekman Plank Road Company from the construction of part of their road, and for other purposes," as discharges the defendants from the condition imposed by their charter, of carrying on their road from the point it had reached to their appointed terminus, was valid, while all the residue was unconstitutional and void. It was argued, in this case, as indeed it was suggested in the other, that the whole act is unconstitutional, as impairing the obligation of contracts. . . . The contract which this act is supposed to impair, is that made by the company with the supervisor and commissioners of highways of the town of Fishkill, by which these officers granted the use of certain highways to the defendants, and they, as compensation for these privileges, agreed to keep such roads in repair without expense to the town. . . . I do not consider the objection well founded. In making

the agreement of July, 1851, with the defendants, giving them a right to occupy and use the highway, these officers were not acting in their own right or dealing with their own property, either as individuals or as public officers. . . . The supervisor and commissioners were simply agents designated to represent, and authorized to bind, the people in respect to the public right of way and passage over this road. Whether they are to be considered as representing the people of the whole State, or of any portion of it, is immaterial. They derived their authority not from their office nor from the town, but from the action of the legislature, who, by statute, gave them power to make the contract. In conferring this authority, the legislature acted for the people, and could have exercised the power and made the agreement, or granted the right of way, themselves. The legislature could also revoke or resume this authority at any time, or confer it upon other officers. So also, it is very clear to me that they may, either by their direct action, or by authority conferred upon and exercised by any designated agents, modify or rescind these contracts, with the assent of the other party. . . .

2. *Public Service Powers*

EAST HARTFORD v. THE HARTFORD BRIDGE COMPANY *

10 *Howard (U. S.)*, 511. 1850

WRIT of error to review a judgment rendered by the Supreme Court of Connecticut. The plaintiff below, The Hartford Bridge Company, seeks an injunction against the town of East Hartford to restrain it from exercising a ferry privilege between it and the town of Hartford.

The ferry appears to have been operated by the town of Hartford as early as 1681. Tolls were regulated by the colonial legislature, and later by the State legislature. In 1783, the legislature incorporated the town of East Hartford, and granted to it one-half of said ferry "during the pleasure of the General Assembly." In 1808, the legislature incorporated The Hartford Bridge Company, and granted them liberty to erect a bridge across the river, which bridge was erected accordingly.

In 1818, in pursuance of a petition by the bridge company, the legislature enacted that "after the company shall have repaired the bridge, etc., the ferries by law established between the towns of Hartford and East Hartford shall be discontinued, and said town shall never thereafter be permitted to transport passengers across said river," etc. In 1836, an act was passed repealing so much of the Act of 1818 as abolished or discontinued the ferry, restoring the ferry rights to the two towns. In 1841, an act was passed again abolishing the ferry privilege. In 1842,

reinstated by subsequent acts

an act restored the ferry privilege again. The Act of 1836 and that of 1842 were held to be void by the State court in a former proceeding.

The town contends that the Act of 1818 and that of 1841 are unconstitutional in that they impair the obligation of a contract, and violate vested rights in a franchise. The State court gave judgment against the town. (16 Conn. 149.)

Chapman and Toucey, for the plaintiffs.

Parsons and Baldwin, *contra*.

WOODBURY, J. . . . It will be seen that the point before us is one of naked constitutional law, depending on no equities between the parties, but on the broad principle in our jurisprudence, whether power existed in the legislature of Connecticut to pass the acts in 1818 and 1841, which are complained of in this writ of error.

The supposed contract claimed to have been impaired related to certain rights in a ferry, which were alleged to have been granted by the State, across the Connecticut River. This grant is believed to have been made to Hartford as early as the year 1681, and half of it transferred to East Hartford in 1783. But no copy of the first grant being produced, nor any original referred to or found, it is difficult to fix the terms or character of it, except from the nature of the subject and the subsequent conduct of the parties including the various acts of the legislature afterwards passed regulating this matter.

From these it is manifest, that two leading considerations arise in deciding, in the first place, whether by this grant a contract like that contemplated in the constitution can be deemed to exist. They are, first, the nature of the subject-matter of the grant, and next, the character of the parties to it. . . .

Supposing, then, that a ferry may in some cases be private property, and be held by individuals or corporations under grants in the nature of contracts, it is still insisted here, that the ferry across a large navigable river, and whose use and control were entirely within the regulation of the colonial legislature, and came from it, would be a mere public privilege or public license, and a grant of it not within the protection of the Constitution of the United States as a matter of contract.

But it is not found necessary for us to decide finally on this first and more doubtful question, as our opinion is clearly in favor of the defendant in error on the other question; namely, that the parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be consid-

ered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature.

They are incorporated for public, and not private, objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate; which they can sell or devise to others, or which can be attached and levied on for their debts.

Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes.

It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies. . . .

In the *State of Maryland v. Baltimore and Ohio Railroad*, 3 How. 551, this court held that a grant by the legislature to a county, of a sum forfeited, could be dispensed with by the legislature afterwards, as it was made for public, not private purposes, and to a public body.

There is no private interest or property affected by this course, but only public corporations and public privileges. It may be otherwise in case of private bodies, or individuals, or of private property granted or acquired. The legislature might not be justified to revoke, transfer, or abolish them on account of the private character of the party or the subject. *Paulet v. Clark*, 9 Cranch, 292; *Terrett v. Taylor*, *ibid.* 48-50. But everything here is public.

While maintaining the exemption of private corporations from legislative interference, Justice Washington, in 4 Wheat. 659, in the Dartmouth College case, still admits that corporations for "public government," such as a "town or city," are under the control of legislation; whereas private corporations are governed by the statutes of their founders, or by their charters; pp. 660, 661. He remarks further, that the members of such a public corporation "accepted the charter for the public benefit alone, and there would seem to be no reason why the government, under proper limitations, should not alter or modify such a grant at pleasure;" pp. 661, 663. And Justice Story concurs with him by saying: "It may also be admitted that corporations for mere public government, such as towns, cities, and counties, may, in many respects, be subject to legislative control." 4 Wheat. 694. . . .

The public character of all the parties to this grant, no less than its subject-matter, seems, therefore, to show, that nothing in the nature of a contract, with terms to be fulfilled or impaired like private stipula-

tions, existed in this case so as to prevent subsequent interference with the matter by the legislature, as the public interests should appear to require.

But in order to justify the plaintiff in what it set up below, there must not only have been a contract, or *quasi* contract, but a violation of its obligation. It will therefore be useful to follow out further the nature and conditions of this supposed contract, in order to throw more light on both the questions whether this grant was such a contract as the Constitution contemplates, and whether it has been at all impaired. The authority of a legislature may probably supersede such a ferry as is public, and across a great public highway of a navigable river, by allowing a bridge over the same place, as has before been virtually held by this court. 11 Pet. 422; 6 How. 507. It could also alter or abolish wholly the public political corporation to which the grant was made, as this is yearly done in dividing towns and counties, and discontinuing old ones. It is therefore clear, that, whatever in the nature of a contract could be considered to exist in such a case, by a grant to a town of some public privilege, there must be implied in it a condition, that the power still remained or was reserved in the legislature to modify or discontinue the privilege in future, as the public interests might from time to time appear to require. *Charles River Bridge v. Warren Bridge*, 11 Pet. 421; *West River Bridge v. Dix et al.*, 6 How. 507.

Accordingly, it is admitted in this case, that the legislature, as early as 1695, in fact regulated the tolls of this ferry, and continued to do it until 1783, when it granted to East Hartford one-half of the privilege, and that only "during the pleasure of the assembly." All concerned in the privilege, therefore, became thus estopped to deny that this ferry was to be used by the town as a mere public license, and to be used in conformity with the views of the legislature as to what in future might be deemed most useful to the community at large.

Because the old town of Hartford acquiesced in this regulation of tolls, and in this transfer of half to East Hartford in this limited or conditional manner, and the latter acquiesced in the acceptance of it on the terms expressed, to hold it "during the pleasure of the assembly."

Such being, then, the public character of the subject and parties of the grant, and such the terms and conditions of it, — rather than being one of private property, for private purposes, to private corporations or individuals, and absolutely rather than conditionally — in what respect has it been violated by the legislature? . . .

The legislature, in making the discontinuance, did only what it supposed was advantageous to the public, by securing a better, quicker, and surer method of passing the river on the bridge; and it thus appears to have violated no condition or terms of any contract or *quasi* contract, if it had made any with the plaintiff. 11 Pet. 542.

On the contrary, as before suggested, the legislature merely acted within its reserved rights, and only passed a new law on a public subject,

and affecting only a public body. But beside the implied powers continuing in the legislature, as heretofore explained, and which warrant all it did in 1818, and the exercise of which cannot be regarded as impairing any contract, we have seen that there was an express provision in the grant to East Hartford, limiting the half of the ferry transferred to it "during the pleasure of the assembly." . . .

The judgment below must be affirmed.

3. Property: Right of Local Self-Government *Michigan*

PEOPLE *ex rel.* LE ROY *v.* HURLBUT *et al.**

24 Mich. 44. 1871

INFORMATION in the nature of *quo warranto*, brought to test the right of the members of the boards of water commissioners and sewer commissioners of the city of Detroit, to continue in office after the taking effect of an act establishing a board of public works. The questions raised relate to the validity of that act.

The act transfers to the board of public works all the powers, duties, and responsibilities of the "Board of Water Commissioners," the "Board of Sewer Commissioners," and of the "Commissioners of Grades and Plans." It gives the board charge and control of the streets, public parks, and grounds of the city, and of the construction of engine houses, city hall, and all other Public Buildings (except school-houses), public sewers, drains, and water-works. It vests in the board, for the purposes of the city, the property of the old boards, of which the water-works was the greater part; authorizes the board to take property by the right of eminent domain; to contract for the performance of the works entrusted to them, and employ workmen; to draw upon the proper funds, or, in certain cases, to issue bonds, for payment of expenses; and to make by-laws governing the public works in their charge.

The act appoints the first members of the board, specifies the terms of their offices respectively, and provides that vacancies, whether by expiration of term or otherwise, shall be filled by the common council of the city; and provides that no person shall be eligible for said board who is not a freeholder in said city, and a qualified elector.

J. P. Whittemore, Lyman Cochrane, E. W. Meddagh, and Theodore Romeyn, for the respondent.

Samuel T. Douglas, George V. N. Lothrop, and J. Logan Chipman, for the relators.

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68 Mich. 1-10

70 Public Works

CAMPBELL, C. J. . . . The questions presented arise upon the source of the appointment, and upon the extent of the powers of the board, as well as upon some independent objections.

It was suggested on the argument that the first of these inquiries was barred by our decision in the case of *The People v. Mahaney*, 13 Mich. R. 492, where the validity of the police act was sustained. That decision held that police commissioners might be lawfully appointed by State authority. . . .

The only remaining question, therefore, concerning the application of our former decision to this case is, whether the police board is a State or a municipal agency. If the former, that decision concludes nothing now before us. If the latter, it ends one important part of this controversy. I think it is clearly an agency of the State government, and not of the municipality.

The only confusion existing on this subject has arisen from the custom prevalent under all free governments of localizing all matters of public management, as far as possible, and of making use of local corporate agencies whenever it can be done profitably, not only in local government, where it is required by clear constitutional provisions, but also for purposes of State. Illustrations of this might easily be multiplied. The whole system of State taxation, under our laws, is made to depend on the action of town and county officers, who make the assessments and collect most of the taxes. And the whole machinery of civil and criminal justice has been so generally confided to local agencies that it is not strange if it has sometimes been considered as of local concern. But there is a clear distinction in principle between what concerns the State and that which does not concern more than one locality; and where the Constitution has made no rule for their management, affairs belonging to State policy must be subject to immediate State control, if the legislature shall deem it necessary. . . .

The preservation of the peace has always been regarded, both in England and in America, as one of the most important prerogatives of the state. It is not the peace of the city or county, but the peace of the king or state that is violated by crimes and disorders. The prosecution is on behalf of the State. The trial is before tribunals created and regulated by the State. The remission of punishment is by the governor of the State. . . .

There is no dispute concerning the character of the public works act. Its purposes are directly and evidently local and municipal. And the main point to be decided is, whether the legislature of the State can, without the concurrence of the city of Detroit, select the local officers of the city. . . .

In the litigation now before us there is no acquiescence by the city in the choice of the board of works, or in any part of the legislative action on the subject. We are, therefore, compelled to consider the

plain question, whether the State authorities have a right to assume unlimited control of all municipal appointments. . . .

We must never forget, in studying its terms [those of the Constitution], that most of them had a settled meaning before its adoption. Instead of being the source of our laws and liberties, it is, in the main, no more than a recognition and re-enactment of an accepted system. The rights preserved are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions. They were not towns or counties or cities or villages, in the abstract — or municipalities which had lost all their old liberties by central usurpation — but American and Michigan municipalities of common-law origin, and having no less than common-law franchises. . . .

COOLEY, J. [After referring to other questions.] We have before us a legislative act creating for the city of Detroit a new board, which is to exercise a considerable share of the authority usually possessed by officers locally chosen; to have general charge of the city buildings, property, and local conveniences, to make contracts for public works in behalf of the city, and to do many things of a legislative character which generally the common council of cities alone is authorized to do. The legislature has created this board, and it has appointed its members; and both the one and the other have been done under a claim of right which, unless I wholly misunderstand it, would justify that body in taking to itself the entire and exclusive government of the city, and the appointment of all its officers, excepting only the judicial, for which, by the Constitution, other provision is expressly made. And the question, broadly and nakedly stated, can be nothing short of this: whether local self-government in this State is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure. I state the question thus broadly because, notwithstanding the able arguments made in this case, and after mature deliberation, I can conceive of no argument in support of the legislative authority which will stop short of this plenary and sovereign right.

Now it must be conceded, that the judicial decisions and law writers generally assert that the State creates the municipal bodies, endows them with such of the functions of corporate life and entrusts them with such share in the local government, as to the legislative judgment shall seem best; that it controls and regulates their action while they exist, subjects them to such changes as public policy may dictate, and abolishes them at discretion; in short that the corporate entities are mere agencies which the State employs for the convenience of government, clothing them for the time being with a portion of its sovereignty, but recalling the whole or any part thereof whenever the necessity or usefulness of the delegation is no longer apparent. This I understand to be the accepted theory of State constitutional law as regards the

municipal governments. We seldom have occasion to inquire whether this amplitude of legislative authority is or is not too strongly expressed, for the reason that its exercise is generally confined within such bounds as custom has pointed out, so that no question is made concerning it. But such maxims of government are very seldom true in anything more than a general sense; they never are and never can be literally accepted in practice.

Our Constitution assumes the existence of counties and townships, and evidently contemplates that the State shall continue to be subdivided as it has hitherto been; but it nowhere expressly provides that every portion of the State shall have county or township organizations. It names certain officers which are to be chosen for these subdivisions, and confers upon the people the right to choose them; but it does not in general define their duties, nor in terms preclude the legislature from establishing new offices, and giving to the incumbents the general management of municipal affairs. If, therefore, no restraints are imposed upon legislative discretion beyond those specifically stated, the township and county government of any portion of the State might be abolished, and the people be subjected to the rule of commissions appointed at the capital. The people of such portion might thus be kept in a state of pupillage and dependence to any extent, and for any period of time the State might choose.

The doctrine that within any general grant of legislative power by the Constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take away their liberties altogether. If we look into the several State constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties, but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy. The implied restrictions upon the power of the legislature, as regards local government, though

their limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The Constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations.

The circumstances from which these implications arise are: First, that the Constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, second, that the liberties of the people have generally been supposed to spring from, and be dependent upon, that system.

De Tocqueville speaks of our system of local government as *the American system*, and contrasts it forcibly with the French idea of centralization, under the influence of which constitutional freedom has hitherto proved impossible: *Democracy in America*, ch. 5. Lieber makes the same comparison, and shows that a centralized government, though by representatives freely chosen, must be despotic, as any other form of centralization necessarily is. "Self-government," he says, "means everything for the people and by the people, considered as the totality of organic institutions, constantly evolving in their character as all organic life is; but not a dictatorial multitude. Dictating is the rule of the army, not of liberty; it is the destruction of individuality." *Civil Liberty and Self-Government*, ch. 21. The writer first named, speaking of the New England township government, whose system we have followed in the main says: "In this part of the union the impulsion of political activity was given in the townships; and it may almost be said that each of them originally formed an independent nation. When the kings of England asserted their supremacy, they were contented to assume the central power of the State. The townships of New England remained as they were before; and, although they are now subject to the State, they were at first scarcely dependent upon it. It is important to remember that they have not been invested with privileges, but that they seem on the contrary, to have surrendered a portion of their independence to the State. The townships are only subordinate to the States in those interests, which I shall term *social*, as they are common to all the citizens. They are independent in all that concerns themselves; and among the inhabitants of New England, I believe that not a man is to be found who would acknowledge that the State has any right to interfere in their local interests." *Democracy in America*, *ubi supra*. Now, if this author is here speaking of the theory of our institutions, he is in error. It is not the accepted theory that the States have re-

ceived delegations of power from independent towns; but the theory is, on the other hand, that the State governments precede the local, create the latter at discretion, and endow them with corporate life. But, historically, it is as difficult to prove this theory as it would be to demonstrate that the origin of government is in compact, or that title to property comes from occupancy. The historical fact is, that local governments universally, in this country, were either simultaneous with, or preceded the more central authority. In Massachusetts, originally a democracy, the two may be said to have been at first identical; but when the colony became a representative government, and new bands pushed out into the wilderness, they went bearing with them grants of land and authority for the conduct of their local affairs. *Hutchinson's Massachusetts Bay*, ch. 1; *Washburn's Jud. Hist. of Mass.*, ch. 1; *Body of Liberties*, §§ 62, 66, 72; *Elliot's New England*, vol. 4, pp. 425, 427.

But in Connecticut the several settlements originated their own governments, and though these were doubtless very imperfect and informal, they were sufficient for the time being, and the central government was later in point of time. *Trumbull's Hist. of Conn.*, vol. 1, pp. 132, 498; *Palfrey's New England*, vol. 1, p. 454. What the colony did was only to confer charters, under which the town authority would be administered within agreed limits and possibly with more regularity than before. In Rhode Island, it is also true, that township organization was first in order of time. *Arnold's Hist. of R. I.*, ch. 7. This author justly remarks, that when the charter of Rhode Island was suspended to bring her under the dominion of Andros, "the American system of town governments, which necessity had compelled Rhode Island to initiate fifty years before, became the means of preserving the liberty of the individual citizen when that of the State, or colony, was crushed." Vol. 1, p. 487. So in Vermont, the people not only for a time conducted all their public affairs in towns and plantations, through committees, officers, and leaders, nominally appointed and submitted to by general consent and approbation, but they carried on their controversy with New York for some years, without any other organization. *Williams' Hist. of Vermont*, vol. 2, p. 163. In New Jersey, as in Massachusetts, towns were chartered in connection with grants of land, and, in some instances, those which were made by Nichols, adverse to the proprietary, were suffered to remain after his authority was superseded. See instances in *Mulford's Hist. of N. J.*, pp. 143-144. The charter to Lord Baltimore plainly recognized local government in the provision requiring the laws and ordinances established to conform to the laws, statutes, or rights of England. *Bozman's Hist. of Maryland*, p. 290. And county authorities seem to have existed from the very first, though their statutory organization, if any they had, cannot be traced. *Bozman*, pp. 299-303. But it cannot be necessary to particularize further. The general fact was, that whether

the colonial or local authority should originate first, depended entirely upon circumstances which might make the one or the other the more immediate need. But when both were once established they ran parallel to each other, as they were meant to do, for all time; and what Mr. Arnold says of Rhode Island may be said generally of the eastern and middle States that the attempt of the last two Stuarts to overthrow their liberties was defeated by means of the local organizations. The scheme tried first in England, to take away the corporate charters in order to make the corporators more dependent on the crown, and to restrain them from political action in opposition to the court party, found, in America, the colonial charters alone within the reach of arbitrary power; and though these were taken away or suspended, it was only with such protest and resistance as saved to the people the town governments. In Massachusetts, it was even insisted by the people's deputies that, to surrender local government was contrary to the sixth commandment, for, said they, "men may not destroy their political any more than their natural lives." So it is recorded they clung to "the civil liberties of New England" as "part of the inheritance of their fathers." *Palfrey's New England*, vol. 3, pp. 381-383; *Bancroft's U. S.*, vol. 2, pp. 125-127; *Mass. Hist. Col.*, XXI, 74-81. The whole contest with Andros, as well as in New England, as in New York and New Jersey, was a struggle of the people in defense of the right of local government. "Everywhere," says Dunlap, "the people struggled for their rights and deserved to be free." *Hist. of N. Y.*, vol. 1, p. 133; and see *Trumbull's Hist of Conn.*, vol. 1, ch. 15.

I have confined this examination to the States which have influenced our own polity most; but the same principle was recognized and acted on elsewhere. The local governments, however, were less complete in the States further south, and this, with some of their leading statesmen, was a source of regret.

Mr. Jefferson, writing to Governor Tyler in 1810, speaks of the two great measures which he has at heart, one of which is the division of counties into hundreds. "These little republics," he says, "would be the main strength of the great one. We owe to them the vigor given to our Revolution, in its commencement, in the eastern States. . . . Could I once see this, I should consider it as the dawn of the salvation of the republic." *Jefferson's Works*, vol. 5, p. 525. Mr. Jefferson understood thoroughly the truth, so quaintly expressed by Bacon, when he said of a burden imposed as compared to one freely assumed, that "it may be all one to the purse, but it worketh diversely upon the courage."

Such are the historical facts regarding local government in America. Our traditions, practice, and expectations have all been in one direction. And when we go beyond the general view to inquire into the details of authority, we find that it has included the power to choose

in some form the persons who are to administer the local regulations. Instances to the contrary, except where the power to be administered was properly a State power, have been purely exceptional. The most prominent of these was the case of the mayor of New York, who continued, for a long time after the Revolution, the appointee of the governor. But this mode of choice originated when the city was the seat of colonial government, and while it constituted a large part of the colony, and the office was afterwards of such dignity and importance, and was vested with so many general powers, that one of the first statesmen of the nation did not hesitate to resign a seat in the senate of the United States to accept it. *Hammond's Pol. Hist. of N. Y.*, vol. 1, p. 197. Moreover, the first Constitution of New York was, in important particulars, exceptional. That State had at the time a powerful aristocratic element, by which its first institutions were in a great measure shaped; and a distrust of popular authority was manifest. It is scarcely needful to say that features of that character disappeared when the Constitution was revised.

For those classes of officers whose duties are general — such as the judges, the officers of militia, the superintendents of police, of quarantine, and of ports, by whatever name called — provision has to a greater or less extent, been made by State appointment. But these are more properly State than local officers; they perform duties for the State in localities, as collectors of internal revenue do for the general government; and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general. In the case before us, the officers in question involve the custody, care, management, and control of the pavements, sewers, waterworks, and public buildings of the city, and the duties are purely local. The State at large may have an indirect interest in an intelligent, honest, upright, and prompt discharge of them, but this is on commercial and neighborhood grounds rather than political, and is not much greater or more direct than if the State line excluded the city. Conceding to the State the authority to shape the municipal organizations at its will, it would follow that a similar power of control might be exercised by the State as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it. There are cases which assert such power, but they are opposed to what seem to me the best authorities as well as the soundest reason. The municipality, as an agent of government, is one thing; the corporation, as an owner of property is in some particulars to be regarded in a very different light. The Supreme Court of the United States held at an early day that grants of property to public corporations could not be resumed by the sovereignty. *Terrett v. Taylor*, 9 Cranch, 43; *Town of Pawlet v. Clark*, *ibid.* 292; and see *Dartmouth College v. Woodward*, 4 Wheat. 694-698. When the State deals with a municipal corporation on the footing of contract,

it is said by Trumbull, J., in *Richland v. Lawrence*, 12 Ill. 8, the municipality is to be regarded as a private company. In *Detroit v. Corey*, 9 Mich. 165, Manning, J., bases his opinion that the city was liable for an injury to an individual, occasioned by falling into an excavation for a sewer, carelessly left open, upon the fact that the sewers were the private property of the city, in which the outside public or people of the State at large had no concern. In *Warren v. Lyons*, 22 Ia. 351, it was held incompetent for the legislature to devote to other public uses land which had been dedicated for a public square. In *State v. Haben*, 22 Wis. 660, an act appropriating moneys collected for a primary school to the erection of a State normal school building in the same city was held void. Other cases might be cited, but it seems not to be needful. They rest upon the well understood fact that these corporations are of a twofold character: the one public as regards the State at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens; and that as to the acquisitions they make in the latter capacity as mere corporations, it is neither just, nor is it competent, for the legislature to take them away, or to deprive the local community of the benefit thereof. There may come a time when from necessity the State must interpose. The State may change municipal boundaries; and then a division of the corporate property may be needful. The State may take away the corporate powers, and then the property must come to the State as trustee for the parties concerned. In either of these cases, undoubtedly, State action becomes essential; and the property may be disposed of according to the legislative judgment and sense of justice; but even then the appropriation must have regard, so far as the circumstances of the case will admit, to the purposes for which the property was acquired, and the interest of those who were corporators when the necessity for State intervention arose.

In view of these historical facts, and of these general principles, the question recurs whether our State Constitution can be so construed as to confer upon the legislature the power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned. . . .

Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell, and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law it would hardly do to call upon a protesting people to show where in the Constitution the power to establish

it was prohibited; it would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred. Some things are too plain to be written. If this charter of State government which we call a Constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so — if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give — this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone. . . .

The State may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the State cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the State not only shaped its government, but at discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

What I say here is with the utmost respect and deference to the legislative department; even though the task I am called upon to perform is to give reasons why a blow aimed at the foundation of our structure of liberty should be warded off. Nevertheless, when the State reaches out and draws to itself and appropriates the powers which from time immemorial have been locally possessed and exercised, and introduces into its legislation the centralizing ideas of continental Europe, under which despotism, whether of monarch or commune, alone has flourished, we seem forced back upon and compelled to take up and defend the plainest and most primary axioms of free government, as if even in Anglican liberty, which has been gained step by step, through extorted charters and bills of rights, the punishment of kings and the overthrow of dynasties, nothing was settled and nothing established.

But I think that, so far as is important to a decision of the case

before us, there is an express recognition of the right of local authority by the Constitution. That instrument provides (Art. XV, § 14) that "judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." It is conceded that all elections must, under this section, be by the electors of the municipality. But it is to be observed that there is no express declaration to that effect to be found in the Constitution; and it may well be asked what there is to localize the elections any more than the appointments. The answer must be, that in examining the whole instrument a general intent is found pervading it, which clearly indicates that these elections are to be by the local voters, and not by the legislature, or by the people of a larger territory than that immediately concerned. . . .

So far, then, as the act in question undertakes to fill the new offices with permanent appointees, it cannot be sustained either on general principles or on the words of the Constitution.

[Opinions were delivered also by CHRISTIANCY, J., and GRAVES, J. All concurred in holding that the legislature could not make permanent appointments of local officers like those here concerned. On the question whether the appointments in this case could be sustained as provisional appointments, merely to put the act in operation and fill the offices until appointments should be made by the common council, the court was equally divided. Affirmative, CHRISTIANCY and COOLEY, JJ.; negative, CAMPBELL, C. J., and GRAVES, J.]

CLINTON v. CEDAR RAPIDS, ETC., RAILROAD COMPANY†

24 Iowa, 455. 1868

PETITION by the city of Clinton for an injunction to prevent the defendant railroad company from taking or using for its railroad track any of the streets of the city. The bill alleges that in 1859 the city council of Clinton passed an ordinance prohibiting any railroad company from constructing its track through, upon, or across, any street in the city; and that, notwithstanding the refusal of the city to grant the use of its streets, and the ordinance above referred to, the defendant, in August 1867, began to dig in certain streets of the city and prepare the same for its road. The fee of the streets is vested in the city.

The answer refers to an Act of 1860 of the Iowa legislature, which provided that the defendant company should build a railroad, of a specified kind, to a point of intersection with the Chicago, Iowa and

W. & A. Co.

Nebraska Railroad within the city of Clinton, and should operate the same in connection with the latter road. It avers that it has avoided the streets and public grounds of the city as far as practicable, but that it is impracticable to build the road without passing over some streets; that it does not propose to occupy any part of the streets of the city except as is necessary to intersect with the Chicago, Iowa and Nebraska Railroad.

The defendant has appealed from an order of the District Court refusing to grant a motion to dissolve a temporary injunction.

Isaac Cook and A. R. Cotton, for the appellant.

W. E. Leffingwell, E. S. Bailey and M. H. Tyrrell, for the appellee.

DILLON, C. J. . . . The plaintiff was created a municipal corporation by "An act to incorporate the city of Clinton," approved January 26, 1857. .

By it, the city was invested with the following powers respecting streets:

"To establish the grade of the streets, alleys and wharves, and to change that of the wharves at pleasure, and that of a street or alley upon the petition of two-thirds of the value of the real property on both sides the street where the change is desired."

"14th. To cause the streets and alleys of the city to be paved, and the pavement to be repaired," etc.

"17th. To establish and locate streets and alleys, and to vacate the same upon the petition of two-thirds the value of the real property on both sides the street or alley where the change is desired."

It is said in argument, that at the charter election, held April 5, 1859, the city adopted a new charter, of which "sect. 27" is as follows:

"The council shall have the exclusive care, supervision and control of all public highways, bridges, streets, alleys, parks, commons, levees and landings within the city, and may cause the same to be kept open and in repair, and free from all obstructions and nuisances."

We do not stop to inquire under or by virtue of what authority, the city adopted the new charter.

These are all the provisions referred to by the counsel for the city as material to the present controversy. The fee of the streets, it is conceded, is in the city, in trust for the public.

By virtue of these charter provisions and this ownership of the fee, the city claims, that it has the exclusive control of the streets and therefore it may consent to or prohibit, as by its common council it shall deem best for the public interest, the use of its streets for railway purposes, and that the courts cannot interfere with or control the decision of the common council respecting this matter, whatever that decision may be.

If these were all the provisions of the law applicable to this subject, the position of the city might, and I think would be, well taken. But there are two other statutes which have a material bearing upon this

subject, and which are relied on by the defendant to support the claim which it makes of a right (subject to reasonable police and other regulations) to use such portions of the public streets of the city as are necessary to enable it to construct the road in question.

The first of these statutes is, "An act granting to railroad companies the right of way." Rev. 218, Art. 3, passed in A. D. 1853. The other statute is, the Act of 1860 (Laws, 1860, p. 40), so often previously referred to in this opinion.

The former statute — the right of way act — underwent examination, and was construed in the case of *Millburn v. The City of Cedar Rapids and The Chicago, Iowa and Nebraska R. R. Co.* (12 Iowa, 246). . . .

In stating the grounds of that decision, the court held, that, under our statute, the fee of the streets was in the corporation in trust for the public, and not, as at common law, in the owners of lots fronting thereon. . . .

It has above been stated, that the court, in the *Millburn* case, construed the right of way act of 1853 to give railroad companies the power to run upon the streets of cities. . . .

As to a highway in the country, or a street in a city, where the fee is in the adjoining owner, I am not prepared to say, that to lay a railroad down upon it, is not an additional burden for which such proprietor is entitled to compensation. . . .

But it is a mistake to suppose that, where the fee of the streets is in the city, in trust for the public, the city is constitutionally and necessarily entitled to compensation the same as a private proprietor holding the fee. The legislature might provide for such compensation, but is not bound to do so. . . .

The constitutional provision is, that, "*Private* property shall not be taken for public use without just compensation to the owner." Art. 1, § 18.

The streets of the city are not the private property of the corporation in such a sense that the legislature cannot, so far as regards the corporation, authorize the same to be used for any public purpose for which it may see fit unless it makes compensation to the city for such use.

Since the decision in the *Millburn* case, the Court of Appeals of New York have decided this very point, in the case of the *People v. Kerr* (27 N. Y. 188). In that case it appeared, that the fee of the streets of New York city was vested in the corporation in trust for the public. It was held by the court, that the city held this fee in trust for the public use of all the people of the State, and not as the corporate property of the city.

The legislature authorized a street railway to be laid down upon certain streets in New York city without the consent of the city, and without providing for compensation to the city or the adjacent lot owners. The Court of Appeals, upon full consideration, decided that this might

constitutionally be done, for the reason that the interest of the city in its streets was *publici juris*, and under the unqualified control of the legislature.

On this point, Emott, J., said: "The title (in the streets) thus vested in the city of New York, is as directly under the power and control of the legislature, for any public purposes, as any property held directly by the State, or any public body or officers, and its application cannot be challenged by a corporation (the city) which, in respect to such property, at least, is a mere agent of the sovereign power of the people." Page 199.

Wright, J., said, and the court concurred therein: "I am clearly of the opinion, that the city corporation has no property in the streets of a character to be protected by the constitutional limitation on the right of eminent domain." Page 212, and see also page 213.

The true view is this: Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature.

This plenary power on the part of the legislature over public corporations, saving vested rights of property and of creditors, is a doctrine so well settled that it is unnecessary to refer to more than a few cases asserting it. *Dartmouth College Case*, 4 Wheat. 519; *People v. Morris*, 13 Wend. 325; *Purdy v. The People*, 4 Hill, 384; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *People v. Kerr*, *supra*; 2 *Kent's Com.* 305.

But while the corporation exists, and has been allowed to acquire private property, such property is doubtless protected by the constitutional provision the same as the private property of the citizen. The distinction is just here. A city by its constituent act may be authorized to acquire property for a market-house, a public hall or the like. Of this property the city cannot be deprived by legislative act, except it be taken for public use, and if so taken, the city is entitled to compensation.

But its property in its public streets is not of this nature. The city cannot alien it nor use it for other than legitimate purposes.

Over the use of property acquired by the exercise of the right of eminent domain, or dedicated under the statutes to public use, where the soil, the fee, passes from the dedicator, the legislature, so far as regards the rights of public corporations, possesses an unlimited control.

Private citizens owning contiguous property may have rights in or

to the use and enjoyment of such public property over which the power of the legislature is not boundless and supreme.

But we are required to consider only the rights of public corporations, and these rights they hold at the absolute will and pleasure of the legislature as the representative of the public. . . .

The legislative history of the road in question, and particularly the various provisions of section six of the Act of 1860, show to our minds most satisfactorily that the legislature intended to give to the defendant all requisite power to build and operate the road.

It fixed both terminal points. One *terminus* was at the "point of intersection with the Chicago, Iowa and Nebraska Railroad *within the corporate limits of Clinton city.*" The fact in the present case is made to appear that it is utterly *impossible* to construct this road at all without crossing, and to some extent going lengthwise upon the streets of the city. . . .

Under these circumstances, when the legislature said to the defendant, "You shall build this road, and you shall build it to such a *point*; . . . they intended to give, and did give, to the defendant, in connection with other existing statutes, all needful power to effectuate and carry into execution the legislative will. . . .

Reversed.

PROPRIETORS OF MOUNT HOPE CEMETERY v. CITY OF
BOSTON *et als.**

158 Mass. 509. 1893

PETITION for a writ of *mandamus* to compel the city of Boston and its mayor to convey Mount Hope Cemetery to the petitioners, in accordance with Stat. 1889, ch. 265.

Hearing before KNOWLTON, J., who made certain findings of fact, and reserved the case for the full court on the petition, answers, and such of his findings as were competent to be considered. The facts material to the decision are stated in the opinion.

W. Gaston & J. B. Richardson (*S. W. Creech, Jr.*, with them), for the petitioners.

T. M. Babson, for the city of Boston.

S. D. Charles, for other respondents.

ALLEN, J. Over property which a city or town has acquired and holds exclusively for purposes deemed strictly public, that is, which the city or town holds merely as an agency of the State government for the performance of the strictly public duties devolved upon it, the legislature may exercise a control to the extent of requiring the city or town, without

receiving compensation therefor, to transfer such property to some other agency of the government appointed to perform similar duties, and to be used for similar purposes, or perhaps for other purposes strictly public in their character. Thus much is admitted on behalf of the city, and the doctrine is stated and illustrated in many decisions. *Weymouth & Braintree Fire District v. County Commissioners*, 108 Mass. 142; *Whitney v. Stow*, 111 Mass. 368; *Rawson v. Spencer*, 113 Mass. 40; *Stone v. Charlestown*, 114 Mass. 214. *Kingman, petitioner*, 153 Mass. 566, 573; *Mayor, etc., of Baltimore v. State*, 15 Md. 376; *Meriwether v. Garrett*, 102 U. S. 472.

By a quite general concurrence of opinion, however, this legislative power of control is not universal, and does not extend to property acquired by a city or town for special purposes not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain with payment of compensation. This distinction we deem to be well founded, but no exact or full enumeration can be made of the kinds of property which will fall within it, because in different States similar kinds of property may be held under different laws and with different duties and obligations, so that a kind of property might in one State be held strictly for public uses, while in another State it might not be. But the general doctrine that cities and towns may have a private ownership of property which cannot be wholly controlled by the State government though the uses of it may be in part for the benefit of the community as a community, and not merely as individuals, is now well established in most of the jurisdictions where the question has arisen. *Board of Commissioners v. Lucas*, 93 U. S. 108, 114, 115; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 533; *Railroad Co. v. Ellerman*, 105 U. S. 166, 172; *Cannon v. New Orleans*, 20 Wall. 577; *Mayor, etc., of New York v. Second Avenue Railroad*, 32 N. Y. 261; *People v. Batcheller*, 53 N. Y. 128; *People v. O'Brien*, 111 N. Y. 1, 42; *Webb v. Mayor, etc., of New York*, 64 How. Pr. 10; *Montpelier v. East Montpelier*, 29 Vt. 12; *Western Saving Fund Society v. Philadelphia*, 31 Penn. St. 175; *People v. Detroit*, 28 Mich. 228, 235, 236, 238; *People v. Hurlburt*, 24 Mich. 44; *Detroit v. Detroit & Howell Plank Road*, 43 Mich. 140; *Thompson v. Moran*, 44 Mich. 602; *Louisville v. University of Louisville*, 15 B. Mon. (Ky.) 642; *Richland v. Lawrence*, 12 Ill. 1; *People v. Mayor, etc., of Chicago*, 51 Ill. 1; *Grogan v. San Francisco*, 18 Cal. 590; *Hewison v. New Haven*, 37 Conn. 475. The same conclusion is arrived at, after a full and clear discussion of the subject, in *Dillon, Mun. Corp.* (4th ed.) §§ 66-68, and notes. See also *Cooley, Taxation*, 688.

In this Commonwealth the question has not directly arisen in reference to the power of the legislature to compel a transfer of the property of a city or town, but the double character of cities and towns in reference to their duties and liabilities has very often been adverted to.

When a city or town acts merely as an agent of the State government in performing duties for the general benefit, it is usually held free from liability to persons who sustain injuries through negligence, except in the case of defective highways, which constitute an exception to the general rule. But in other cases, where an element partly commercial comes in, a liability is usually enforced. *Tindley v. Salem*, 137 Mass. 171, 172, and cases cited; *Worden v. New Bedford*, 131 Mass. 23; *Bailey v. Mayor, etc., of New York*, 3 Hill (N. Y.), 531. In such cases the ultimate question usually is, Did the legislature mean that the city or town, or other creature of statute, should be liable for negligence or did it not? *Howard v. Worcester*, 153 Mass. 426; *Southampton & Itchin Bridge v. Southampton*, 8 El. & Bl. 801, 812; *Cowley v. Mayor, etc., of Sunderland*, 6 H. & N. 565, 573; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 686, 707, 709, 710, 721. But in determining this question courts make a discrimination in respect to the character of the duties and of the property which are involved. Nowhere else has this ground of distinction been more often or more strongly insisted on than in Massachusetts. See cases cited in *Tindley v. Salem*, 137 Mass. 171, 174; *Pratt v. Weymouth*, 147 Mass. 245, 254; *Neff v. Wellesley*, 148 Mass. 487, 493; *Lincoln v. Boston*, 148 Mass. 578; *Curran v. Boston*, 151 Mass. 505, 508. In the recent case of *Merrimack River Savings Bank v. Lowell*, 152 Mass. 556, we had occasion to make an analogous discrimination between the general duty which the city of Lowell was under to furnish water on equal terms to all its inhabitants, and the particular undertaking to furnish water for a year to an individual who had paid a year's rates in advance.

In the case before us, we have to determine whether the title of the city of Boston to the Mount Hope Cemetery is subject to legislative control, and this involves an inquiry to some extent into the usages and laws in this Commonwealth relating to burying grounds, with a view of ascertaining whether, in the ownership of such property, towns have heretofore been regarded or have acted merely as agencies of the State government. gr

In early times, when land was set apart for a burying ground, it was sometimes under the care and control of the town or district, and sometimes under that of the parish. It is said in . . . *Larkin v. Ames*, 10 Cush. 198, 218, "Although in early times the establishment, care, and control of burial grounds, like the support of schools, might have been partly a parochial and partly a municipal duty, yet before the erection of a new parish in the town of Pepperell, in 1831, they were regarded as appertaining rather to towns than to parishes." We cannot find either in the statutes or the history of Massachusetts any clear line of distinction between the duty or usages of towns and of parishes in this respect. Sometimes land was set apart or bought and owned by the town or district for this purpose, and sometimes by the parish. Instances of ancient ownership by towns, by districts, and by parishes

are referred to in *First Parish in Shrewsbury v. Smith*, 14 Pick. 297; *Bachelder v. Wakefield*, 8 Cush. 243; and *Larkin v. Ames*, 10 Cush. 198; and there appears to be no doubt that money for providing, enlarging, and maintaining them was raised by each of these corporate bodies. More than two hundred years ago the town of Boston bought land for burying grounds, the Chapel, Copp's Hill, and the Granary burying grounds being the earliest. *Shurtleff's Top. & Hist. Description of Boston*, 182 *et seq.*; 1 *Memorial Hist. of Boston*, 554, 555; 2 *ibid.* 528, 529. In the general legislation of the Commonwealth, burying places, whether belonging to towns, districts, parishes, or precincts, were early spoken of, in connection with other pieces of land, as "appropriated for the general use, ease, or convenience of the community," and provision was made for defining their boundaries and protecting them from encumbrances. St. 1786, ch. 67, § 7, and ch. 81, § 6, re-enacted in Rev. Sts., ch. 24, §§ 61, 63. By St. 1828, ch. 141, § 1, the First Parish in Rowley was authorized to assess a tax for the enlargement of its burial ground, or to purchase a new one, on all polls within the territorial limits of the said parish, and on estates within said limits, for the use and benefit of all the inhabitants living within said limits and their successors forever.

No general statute which in express terms authorizes the expenditure of money for the purchase and care of land for this purpose has been found earlier than St. 1828, ch. 107, in which towns, districts, and parishes, or religious societies are all put on the same footing. The statute is as follows: "Be it enacted . . . that the inhabitants of each town, district, parish, or religious society within this Commonwealth, qualified to vote in town, district, or parish meetings, shall have power, at any meeting called for that purpose, to raise, in the same manner that other town, district, or parish charges may now by law be raised, such sum or sums of money as they shall deem necessary for the purchase of lands for burial grounds, and for the care and preservation of the same." This, as we believe, was merely giving the express sanction of law to what had long been a prevailing usage. The above statute, when incorporated into the Revised Statutes, was divided, the part relating to towns being contained in Rev. Sts., ch. 15, § 12 (which included districts, Rev. Sts., ch. 2, § 6, cl. 17), and that relating to parishes being found in Rev. Sts., ch. 20, § 18.

The time when exclusive rights of burial in particular lots were first assigned or sold to families or individuals is involved in some obscurity. The power to do this also was probably at first assumed by towns and parishes, and afterwards had the sanction of express legislation. . . .

The first private incorporated cemetery company, so far as ascertained, was the Massachusetts Horticultural Society, which by St. 1831, ch. 69, was authorized to appropriate a part of its land for a rural cemetery or burying ground; to lay out lots for family and other burying places; and to grant exclusive rights of burial. This was the origin of the cemetery at Mount Auburn, and a new corporation was formed

under St. 1835, ch. 96, by the name of the Proprietors of the Cemetery at Mount Auburn, which succeeded to the property, powers, and privileges of the Horticultural Society in respect to the cemetery; with the restriction, however, that all of the proceeds of sales of lots which said proprietors were allowed to retain should be forever devoted and applied to the preservation, improvement, embellishment, and enlargement of the cemetery and garden, and the incidental expenses thereof, and for no other purpose whatsoever. This would effectually cut off all right to declare dividends. After this, charters for private cemetery companies were not infrequent. . . .

The cemeteries owned by towns and cities and parishes were called and considered to be public cemeteries, because they were provided and maintained primarily at the expense of the public. . . . But the use of the word "public" by no means implied that exclusive rights to tombs, lots, and burials did not exist therein, by assignment or purchase. By St. 1848, ch. 79, relating to a "public cemetery" in the city of Roxbury, express authority was given to the city council to grant exclusive rights of burial, the proceeds to be paid into the city treasury, and kept separate and devoted to cemetery purposes. By Sts. 1855, ch. 44, and 1854, ch. 390, the cities of Cambridge and Worcester respectively were authorized to manage cemeteries with a right to sell lots, the proceeds to go in each instance into the city treasury. The use of the term "public burial places," as applied to burial places owned by cities or towns, in which lots are sold to individuals, still continues. Pub. Sts., ch. 82, § 17. An example showing that towns were accustomed to sell burial lots to individuals is found in *Fay v. Milford*, 124 Mass. 79.

Such being the laws and usages of the Commonwealth before the time when the city of Boston made its first purchase of the Mount Hope Cemetery, the city, by St. 1849, ch. 150, was "authorized to purchase and hold land for a public cemetery in any town in this Commonwealth, and to make and establish all suitable rules, orders, and regulations for the interment of the dead therein, to the same extent that the said city of Boston is now authorized to make such rules, orders, and regulations for the interment of the dead within the limits of the said city."

Before any purchase under this statute was made, a general statute was passed which included Boston, St. 1855, ch. 257, § 1, providing that "Each city and town in the Commonwealth shall provide one or more suitable places for a burial ground, within which the bodies of persons dying within their respective limits may be interred," and forbidding the use for the burial of the dead of any land in any city or town, other than that already used or appropriated for that purpose, without permission. It also was and long has been, the duty of the overseers of the poor of each town to bury paupers and indigent strangers dying therein. St. 1793, ch. 59, §§ 9, 13. Rev. Sts., ch. 46, §§ 13, 16. (See also, for later statutes on the same subject, Gen. Sts., ch. 70, §§ 12, 15; Pub. Sts., ch. 84, §§ 14, 17, enlarging their duties.) Being under these positive duties,

and having authority under St. 1849, ch. 150, to go outside of the city limits for a burial ground, the city of Boston purchased the largest portion of the land of the Mount Hope Cemetery in West Roxbury in 1857, and has since added to the same at various times, and has received large sums from the sale of lots or burial rights, and has expended large sums in the care and management thereof, and about forty acres still remain unsold. There is no suggestion in argument that in any of these particulars it has acted beyond its powers.

We are not aware that the sale of burial rights in this cemetery has ever been limited to inhabitants of Boston. No such limitation is expressed in the ordinance, but sales may be made to any person or persons. Rev. Ordinances, 1885, ch. 47, § 4. By St. 1877, ch. 69, § 7, re-enacted in Pub. Sts., ch. 82, § 15, towns may sell exclusive burial rights to any persons, whether residents of the town or otherwise, in their cemeteries; and this right extends to cities. Pub. Sts., ch. 3, § 3, cl. 23. There can be no doubt that the city held this cemetery not only for the burial of poor persons, but with the right to make sales of burial rights to any person who might wish to purchase them, whether residents or non-residents. With these duties, and also with these rights and privileges, the city has acquired and improved this property. It is not as if the land had been procured and used exclusively as a place for the free burial of the poor, or of inhabitants of Boston. In addition to these purposes, the city has been enabled to provide a well ordered cemetery, with lots open to purchase, under carefully prepared rules and regulations, and thus to afford to its inhabitants the opportunity to buy burial places without being compelled to resort to private cemetery companies, where the expense would probably be greater; and it has done this upon such terms that the burial of its paupers has been practically without expense in the past, and it has about forty acres remaining, the proceeds of which when sold would go into the city treasury but for the requirement of St. 1889, ch. 265.

3 The St. of 1889, ch. 265, requires the city to transfer to the newly formed corporation, called "The Proprietors of Mount Hope Cemetery," without compensation, this cemetery, with the personal property pertaining thereto, and with the right to any unpaid balances remaining due for lots already sold, and the annual income of certain funds held for the perpetual care of lots. If such transfer is made, all that the city would retain would be the right to bury such persons as it is or may be by law obliged to bury in a certain prescribed portion of the cemetery. Its previous conveyances of lots and rights of burial are expressly confirmed. But it is apparent from the considerations heretofore expressed, that this is not property which is held exclusively for purposes strictly public. The city of Boston is possessed of much other property which in a certain sense and to a certain extent is held for the benefit of the public, but in other respects is held more like the property of a private corporation. Notably among these may be mentioned its system of water-

works, its system of parks, its market, its hospital, and its library. In establishing all of these, the city has not acted strictly as an agent of the State government, for the accomplishment of general public or political purposes, but rather with special reference to the benefit of its own inhabitants. If its cemetery is under legislative control, so that a transfer of it without compensation can be required, it is not easy to see why the other properties mentioned are not also; and all the other cities and towns which own cemeteries or other property of the kinds mentioned might be under a similar liability.

In view of all these considerations, the conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the Constitutions of Massachusetts and of the United States so that the legislature has no power to require its transfer without compensation. Const. of Mass., Dec. of Rights, Art. X. Const. of U. S., Fourteenth Amendment.

In judging of the validity of the particular statute under consideration, St. 1889, ch. 265, there are other reasons leading to the same result. The first is, that the duties of the city in respect to providing a burial place for the poor and for persons dying within its limits are not taken away. The city is still bound to provide one or more suitable places for the interment of persons dying within its limits; Pub. Sts., ch. 82, § 9; and it is still bound to bury its paupers and indigent strangers. Pub. Sts., ch. 84, §§ 14, 17. If this cemetery should be conveyed away, under the provisions of St. 1889, ch. 256, the city would be bound to provide another. Certainly, the mere continuance of the city's right to bury in a limited portion of the cemetery such persons as the law requires it to bury, is not a provision adequate to meet the requirement of Pub. Sts., ch. 82, § 9, and by the report of facts the portion referred to is not likely to suffice even for the burial of paupers for any great length of time. The city is bound to provide a suitable place for the interment of persons dying within its limits; not poor persons only, but all persons; and the burial of the dead in ground not sanctioned by the city authorities is strictly forbidden. So far as we know, it has never been held that the legislature may require a city or town, without compensation, to transfer property which it has bought in order to enable it to discharge its statutory obligations, while at the same time its duties and obligations continue to rest upon it. On the other hand, it is justly assumed that, if the property is to be transferred, the duties will be transferred also. *Rawson v. Spencer*, 113 Mass. 40; *Commonwealth v. Plaisted*, 148 Mass. 375, 386; *Whitney v. Stow*, 111 Mass. 368; *Mayor, etc., of Baltimore v. State*, 15 Md. 376. But the duty of burying paupers and of providing a place for the interment of all persons dying in Boston is not imposed upon the petitioner. The duties of the city, and the duties of the petitioner under St. 1889, ch. 265, are not the same.

Moreover, the legislative power over municipal property, when it

exists, does not extend so far as to enable the legislature to require a transfer without compensation to a private person or private corporation. The control which the legislature may exercise is limited; it must act by public agencies and for public uses exclusively. If the city has purchased property for purposes which are strictly and purely public, as a mere instrumentality of the State, such property is so far subject to the control of the legislature that other instrumentalities of the State may be substituted for its management and care; but even the State itself has no power to require the city to transfer the title from public to private ownership. Upon the division of counties, towns, school districts, public property with the public duty connected with it is often transferred from one public corporation to another corporation. But it was never heard of that the legislature could require the city without compensation to transfer its city hall to a railroad corporation, to be used for a railway station, merely because the latter corporation has a charter from the legislature, and owes certain duties to the public.

It is contended in behalf of the petitioner that it is a public corporation, wholly under the control of the legislature. But it is an error to suppose that a corporation becomes a public one merely by receiving a charter from the legislature, by owing certain duties to the public, and by being subject to rules and regulations established in the exercise of the police power. There is nothing in the case cited — *Woodlawn Cemetery v. Everett*, 118 Mass. 354 — to show that the Woodlawn Cemetery was regarded as a public corporation. It clearly was not so. It was said to be subject to the police power, like other cemetery corporations. *Commonwealth v. Fahey*, 5 Cush. 408. But liability to the exercise of the police power rests on different considerations, and that power does not extend so far as to include a right to require the transfer of property to another person without compensation. The distinction between public and private corporations is well marked and clear. Public corporations are governmental and political, like counties, cities, towns, school districts, — mere departments of the government, established by the legislature, and modified, and destroyed, without their own consent. Private corporations are formed by the voluntary agreement of their members, and cannot be established without the consent of the incorporators. Public corporations, as has been seen, may to some extent in relation to the ownership of property partake of the character of private corporations; and, on the other hand, many private corporations are charged with some duties and obligations to the public, as in the case of railroad, telegraph, canal, bridge, gas, and water companies. *Lombard v. Stearns*, 4 Cush. 60; *Worcester v. Western Railroad*, 4 Met. 564; *Commonwealth v. Smith*, 10 Allen, 448, 455. But the general line of distinction between the two classes of corporations is clear. *Linehan v. Cambridge*, 109 Mass. 212. *Rawson v. Spencer*, 113 Mass. 40, 45; *Morawetz on Corp.*, §§ 3, 24, 1114; 2 *Kent, Com.* 275; 1 *Dillon, Mun. Corp.* (4th ed.) §§ 19, 22, 44, 54, 56. *A. & A. on Corp.*, §§ 14, 30 et

seq.; *University of Maryland v. Williams*, 9 Gill & J. 365, 397; *Ten Eyck v. Delaware & Raritan Canal Co.*, 3 Harr. (N. J.) 200; *Hanson v. Vernon*, 27 Iowa, 28, 53; *In re Deansville Cemetery Association*, 66 N. Y. 569.

An examination of the provisions of St. 1889, ch. 265, leaves no doubt that the petitioner falls within the class of private corporations. Its corporate members are such of the proprietors of burial lots in the existing cemetery as shall accept the act and notify the clerk of the corporation of such acceptance. Membership is wholly voluntary, and in point of fact only about one person out of eight who were entitled to do so became members. The corporation is to be subject to all the provisions of the Pub. Sts., ch. 82, so far as they can be applied thereto, and except so far as inconsistent with St. 1889, ch. 265. Chapter 82 of the Public Statutes relates mostly to private cemetery companies, which may be organized by any ten or more persons. *Jenkins v. Andover*, 103 Mass. 94, 104. Such private cemetery corporation may lay out its real estate into lots, and upon such terms, conditions, and regulations as it shall prescribe may grant and convey the exclusive right of burial, etc. There is nothing in St. 1889, ch. 265, limiting this right, unless in section 5, providing that the city shall continue to have the right of burial, in a certain prescribed portion of the cemetery, of persons for whose burial it is or may be bound by law to provide, viz., paupers and indigent strangers. Subject to this, the petitioner may sell all the remaining lots, as fast as it can, to all applicants. It is true, under Pub. Sts., ch. 82, § 2, it cannot make dividends from the proceeds of sales; but the Proprietors of the Cemetery at Mount Auburn, and many other private cemetery corporations, are under the like restriction. If the city retains the ownership, it may devote the proceeds of sales of lots, after providing for the suitable maintenance of the cemetery, towards the purchase of a new burial place for its inhabitants when occasion may require. If the petitioner owns it, the city will lose that advantage. No duty to the public is imposed upon the petitioner by the terms of the statute, unless it is contained in the words in § 4 of St. 1889, ch. 265, "to be held by said corporation, so far as consistent herewith, for the same uses and purposes, and charged with the same duties, trusts, and liabilities for and subject to which the same are now held by said city;" and the further words, "and the said corporation shall have in respect of said cemetery all rights, powers, and privileges, and be subject to all duties, obligations, and liabilities, now had or sustained by said city in respect thereof." What these duties towards the inhabitants of Boston are, it may be difficult to say. Certainly, there appears to be nothing binding the corporation to give any preference to inhabitants of Boston in the sale of burial rights, or to prevent a substantial increase in the prices of such burial rights at the will of the corporation. In short, there is nothing in the act to secure to the inhabitants of Boston those privileges in respect to burial rights which they might properly expect,

even if they could not legally demand the same from the city itself. There is therefore no ground on which the petitioner can be said in any just sense to be a public corporation, and its duties to the inhabitants of Boston are at best but vague and shadowy.

The city further urges that the obligation of the contracts into which it has entered with purchasers of burial rights, for the perpetual care of their lots, would be impaired by the provisions of St. 1889, ch. 265. Since, for the reasons already given, we are of opinion that the statute was beyond the power of the legislature, it is not necessary to consider this ground of objection to its validity.

Petition dismissed.

STATE OF WISCONSIN v. HABEN *

22 Wis. 629. 1868

APPEAL from the Circuit Court.

Alternative *mandamus*, on the relation of the board of education of the city of Oshkosh, to compel the city treasurer to pay orders drawn by the board in favor of Alger, a contractor constructing a high school building under contract with the board. The board had general power to build schoolhouses in the city, and to tax for supporting the public schools of the city.

In 1866, the legislature empowered the board to raise by special tax, a fund to build a high school building, authorizing them to appropriate, if in their judgment it was necessary, the whole or a part of that fund to the establishment of a State normal school in the city. Under this act, the board levied and collected a tax for a high school building, and the money was paid over to the city treasurer.

While the high school building was in process of construction, the legislature provided that \$10,000 of the money raised by the tax should be retained in the city treasury; and that the purchase money for a site selected for a State normal school in the city, should be paid out of that sum when the title to the site should be approved by the regents of normal schools. A motion was made to quash the writ. Motion denied. Defendant appealed.

Jackson and Halsey, for appellant. . . . As to the transfer of the fund from one purpose to another, they argued that the moneys were public property; that the legislature may change one kind of public use into another, so long as the property continues to be devoted to a public use (27 N. Y. 188; s. c., 37 Barb. 357).

Freeman and Hancock, for the respondent.

DIXON, C. J. This case presents two questions, which may be

stated thus: 1. Was the defendant justified in refusing payment of the orders set forth in the alternative writ? 2. If he was not, are the relators the proper parties to apply to the court for a writ of *mandamus* to compel him to pay them?

The answer to the first question depends on the validity of so much of § 1, chap. 348, Private and Local Laws of 1867, as sets apart and retains in the treasury of the city of Oshkosh, or attempts so to do, the sum of ten thousand dollars out of the tax levied in the year 1866 under the authority conferred by ch. 236, Private and Local Laws of 1866, entitled "An act to authorize the board of education of the city of Oshkosh to levy a tax to build a schoolhouse," which said sum of ten thousand dollars, so to be set apart and retained, was to be paid out as the purchase money for the site for a normal school in said city, to be selected and the title approved and accepted by the board of regents of normal schools. The tax levied in the year 1866, of which this sum of ten thousand dollars was a portion, was, in the words of the act by which it was authorized, levied "to be used for the purpose of erecting a suitable high school building in said city." It was lawfully so levied. It is true that the board of education of the city of Oshkosh, under whose direction the levy was made, were authorized to raise a portion of the sum or sums specified in the sixth section of the act "for the purpose of aiding in the establishment of a State normal school in said city." This authority was, however, purely discretionary; and as the board of education saw fit not to raise any money for that purpose, the inquiry is the same as if no such authority had been conferred.

The question then is: Was it competent for the legislature, without the assent of the city or its inhabitants, thus to divert the funds raised and in the hands of the treasurer for the purpose of erecting a suitable high school building, and to declare that they should be appropriated, not for that purpose, but for the purpose of purchasing the site for a State normal school in the city? We are clearly of the opinion that it was not. . . . What was the act in question but a most obvious attempt at the mere will of the legislature to deprive the city of Oshkosh of so much money lawfully acquired for a proper municipal purpose, and, without the assent of the inhabitants, to apply it to another purpose, not municipal, but one in which all the people of the State have a common interest? Clearly no other effect can be given to it. A State normal school, as its name indicates, is a State institution established for the benefit of the people of the entire State, and maintained by funds provided by the State. This will readily appear from an examination of the several statutes under which those schools are organized, and which prescribe the powers and duties of the board of regents of the same. R. S., ch. 22; Laws of 1859, ch. 94; Laws of 1865, ch. 537; Laws of 1866, ch. 116. The regents are appointed by the governor by and with the approval

of the senate, and the title of the lands, buildings, furniture, books, apparatus, and all other property and effects, is vested in the board, which has the exclusive management and control of the same. To say, therefore, that the legislature can, without the assent of the proper municipal authorities or of the inhabitants, take the money of the city of Oshkosh and appropriate it to the establishment of a State normal school, is to say that it can take the money of any municipal corporation and apply it to any general State purpose. If the act had directed the money in question to be deposited in the State treasury as part of the general fund belonging to the State, or had appropriated it toward the completion of the State capitol now in process of construction, the violent nature of the proceeding might have been more manifest, but it would not have been more unauthorized. The advantages incidentally accruing to the citizens of Oshkosh from the establishment of a State normal school at that place, though sufficient, with the consent of the legislature, to justify the citizens themselves, or the proper municipal officers, in levying a tax to aid in the purchase of a site or the erection of buildings, do not change the nature of the question here presented. The tax so levied must be with the assent of the citizens or proper city officers. The legislature has no power arbitrarily to impose such a tax, as that would not only be in plain conflict with the rule of uniformity in taxation prescribed by the constitution, but contrary to the general principles of law governing such proceedings. If, therefore, the legislature cannot impose a tax for such a purpose, it follows that it cannot for the same purpose arbitrarily appropriate the money of the city already lawfully raised by taxation for another. As well might the legislature, without the assent of the city, appropriate the high school building itself, after its completion, for a State normal school, as seize the funds provided by the city for the purpose of erecting it. This, we think, would be regarded by every one as wholly unjustified by any sound principle of legislation — a mere act of lawless violence. The act in question, though the injustice of it may not be quite so apparent, in reality stands on no better foundation.

2. Are the relators the proper parties to apply for this writ? We think not. . . .

*Order reversed [on latter ground].*¹

¹ Compare *Callam v. Saginaw*, 50 Mich. 7, 14 N. W. 677.

cf. Right of mc to use public funds to secure relocation or location of
state university in its units 1917 K 23545
• Right of State to authorize or direct divers of county funds
to purp other than that for which collected 1915 K 274

COYLE v. ATTORNEY GENERAL *ex rel.* McINTIRE *7 *Houston (Del.)*, 44. 1884

INFORMATION in the nature of a *quo warranto*. The relator, McIntire, claims the office of chief engineer in the water department of the city of Wilmington under an appointment by a board of water commissioners which was established by an act of the legislature passed April 18, 1883. The defendant held the office prior to the act, but was removed by the new board upon appointment of the relator. Defendant claims still to hold the office on the ground that the act which purported to establish the new board is unconstitutional, and that therefore he has never been lawfully removed. In the Superior Court, judgment was entered against defendant by agreement, and he sued out a writ of error.

By the act, three citizens of Wilmington were appointed a board of water commissioners. Their terms were two, four, and six years. Successors were to be appointed by the mayor, for the term of six years.

The board was given control of all matters relating to the water supply of the city; including the management and direction of the waterworks then existing and thereafter to be constructed, the care and supervision of the pipes and fixtures for distribution, and the collection of revenues due or to become due therefrom. The commissioners were given power to make new ordinances and regulations concerning the water system, to fix water rates, and in their discretion to direct, appoint, or remove the officers and employes of the water department. They were to prepare a plan for extending the water system of the city, and were to have power to acquire for the city, by contract or otherwise, real estate for the purpose, the title to be vested in the city. Authority was given the city through the agency of the board to take and use water of the Brandywine River, and to acquire real and personal property for constructing the aqueducts, pipes, reservoirs, buildings, and machinery therefor.

The board was given the right to charge the city for water furnished to fire hydrants, either at \$40 each per year, or such sum as might be agreed upon by the board and the city council; provided that in no case should the city pay less than \$20,000 per year.

It was made the duty of the city, on the requisition of the board, to issue its bonds in prescribed denominations and terms, up to a limited amount. The board was to sell the bonds and apply the proceeds to the enlargement of the water system as authorized by the act. The board was required to fix the water-rates at prices sufficient to produce revenue enough to pay the interest on the bonds and the running expenses; and any surplus funds were to be set apart for payment of the bonds.

Edward G. Bradford, Jr., Benjamin Nields, and W. C. Spruance, for the plaintiff in error.

Ignatius C. Grubb, George H. Bates, and George Gray, for the defendants in error.

SAULSBURY, C. . . . It is unnecessary to review the history of the legislation of the State conferring upon the corporation of Wilmington authority in relation to the supply of water to that city. Such legislation seems to have commenced in 1799, and to have continued from time to time to the present. Water-works existed in the city of Wilmington prior to and at the time of the passage of the act referred to as being the occasion of the origin of these proceedings.

These water-works belonged to, and were under the control of, the corporation. . . .

The plaintiff in error contends that the act of the legislature to establish a board of water commissioners is unconstitutional and void. His counsel, in their very able argument, maintained in substance that a municipal corporation is of a dual character, and possesses two classes of powers and two classes of rights, public and private; that in all that relates to one class it is merely the agent of the State and subject to its control, and that in the other it is the agent of the inhabitants of the place, and not subject to the absolute control of the legislature, its creator; that among the latter is the right to acquire, hold, and dispose of property, to sue and be sued, just as certain rights are conferred upon private corporators and persons not *sui juris*, such as minors and married women, but are not afterwards as long as they exist under legislative control.

They maintain in effect that the act is unconstitutional as being repugnant to that provision of the Constitution of this State which provides that no man shall be deprived of his property except by due process of law. They contend that what they say is the private property of a public corporation is held by such corporation under all the constitutional guarantees that similar property would be protected by in the hands of individual owners of properties, and that this protection exempts a public corporation, as to its water-works, from the regulation and control of the State as effectually as against trespass and wrong committed by individuals. . . .

Public corporations for the government of a town, city, or the like, being for public advantage, are to be governed according to the law of the land. They are the mere creatures of the public institution, created exclusively for the public advantage, without other endowments than such as the government may bestow upon them.

"It would seem reasonable," says Mr. Justice Washington, in *Dartmouth College v. Woodward*, 4 Wheat. 661, "that such a corporation may be controlled and its constitution altered and amended by the government in such manner as the public interest may require. Such legislative interferences cannot be said to impair the contract by which

the corporation was formed, because there is in reality but one party to it." There is in fact no contract in any just sense of that word, and public municipal corporations are not founded on contracts.

The city of Wilmington is a public corporation. It is a municipal corporation which is, as we have seen, an incorporation by the authority of the State of the inhabitants of a particular place or district, which authorizes them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns.

The style and name of the corporation is the mayor and council of Wilmington, and it is declared by its charter that by that name they shall be and are hereby made able and capable in law, to have, take, purchase, receive, possess, enjoy, and retain to them and their successors, lands, tenements, hereditaments, goods, chattels, and effects of what kind, nature, or quality soever, and the same to sell, grant, demise, alien, or dispose of, to sue and be sued, implead and be impleaded, answer and be answered, defend and be defended in all courts of law and equity, or any other place whatsoever, and also to make, have, and use a common seal, and the same to break, alter, and renew at their pleasure, and generally to have all the privileges and franchises incident to a corporation or body politic.

Because it is a municipal corporation, the plaintiff in error contends that its inhabitants are constitutionally entitled to all the rights and privileges of independent local self-government; and that all the property which the corporation is capable to have, take, purchase, receive, and possess, not necessary for the discharge of purely governmental purposes, is, as against the State as well as against individuals, subject to the absolute and uncontrolled possession of the corporation as solely and absolutely as is the property of a purely private corporation or of a private individual. And that the provision of our constitution guaranteeing the rights of property to the owners thereof is applicable to such property and its owners, equally as to like property when owned by private individuals.

The theory of the plaintiff in error, as presented and discussed by his counsel, is a beautiful one. It has all the charm which attaches to the principle of local self-government.

Whether the universal recognition of this principle by legislative and judicial tribunals as applicable to municipal corporations would be attended by all the advantages, and result in all the beneficial consequences, supposed by its advocates, can only be determined when human experience in this respect, if ever, may safely be invoked as a final arbiter.

Does the law, as the court should determine it to be, support the plaintiff's theory?

All that is absolutely necessary for us to say upon this subject is this: The corporation of the city of Wilmington, that is, of the people residing

in the district known as the city of Wilmington, the name and style of whose corporation is the mayor and council of Wilmington, is merely an agency instituted by the State for the purpose of carrying out in detail the objects of government. It is essentially a revocable agency. It has no vested right to any of its powers or franchises. Its charter or act of incorporation is in no sense a contract with the State. It is subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, and may change or modify its internal arrangement, or destroy its very existence at discretion. While it exists in subjection to the will of the State, whose will can only be expressed by the legislature, it enjoys the rights and is subject to the liabilities of any other corporation, public or private. It is because it is a body politic, and has a legal entity and name and a seal by which it can act, that in addition to these the legislature endowed it with the capacity to contract and be contracted with, to sue and be sued, to hold and dispose of property. It is because it has this capacity and these powers that it can acquire rights and incur responsibilities. These franchises were bestowed by the legislature upon it, that it might exercise certain powers of government — not independently of or in defiance of the legislature — over that particular part of the State known territorially as the city of Wilmington. These are its rights affecting its relation to the State. Because, in certain particulars, as a private corporation, it may make contracts which it cannot impair, its absolute dependence upon the will of the legislature for its existence is not thereby diminished or destroyed. Its responsibility in respect to its contracts or torts does not affect its relationship to the State. In our opinion the State may continue its corporate existence, and yet appoint all or any of the agencies through which it has heretofore been accustomed to act.

The city of Wilmington has no vested rights as against the State nor rights not subordinate to the authority of the State. In this respect it is precisely on the same footing, and sustains the same relation to the State, as all other municipal corporations within the State. It has no dual character; as a corporation it is either public or private. It is bound to fulfill its legal contracts and to answer before the legal tribunals for its torts in the same manner and to the same extent as a private corporation or a private individual. The courts for the administration of justice are equally open to corporations of this character as to those of a private nature, or to private individuals. Its rights to property legally held, including the control and government thereof, in respect to all parties other than the State, are the same as if it were a real and not an ideal being. In the case of *Borough of Dunmore's Appeal*, 52 Pa. St. 374, the court say: "Municipal corporations being creatures of the legislative power are subject to the legislative will in a manner and to an extent to which citizens are not. The constitutional guarantees of the citizen were respected in giving him a right of appeal; the municipal corporations having no such guarantees the right of ap-

peal was not given to them." [The court then quoted from *New Orleans Rd. Co. v. New Orleans*, 26 La. An. 481, and commented on the decision.]

. . . The right to acquire, hold, and dispose of property by a corporation does not make that property, in any just sense of the word, private property, and the right and capacity to sue and be sued pertains no more to a private than to a public corporation.

The inhabitants of the city of Wilmington were constituted a corporation, under the name and style of the mayor and council of the city of Wilmington, and were given a seal by the legislature that they might acquire, hold, and dispose of property, sue and be sued. But for what purpose or purposes? For public and not private purposes. The corporation is a public corporation. The uses for which the corporation may acquire and hold property must necessarily, we think, be public uses. Uses, beneficial it may be in some respects to the public at large but certainly beneficial to the citizens generally of the municipality, who may be called a particular local public, although a part of the general public of the State. Such property cannot in any sense be said to be private in the sense in which property may be said to be private which is held by an individual citizen. No citizen of Wilmington possesses any interest in the property of the municipality, which is said to be private, which he can sell or in any manner dispose of. No portion of the property held by the city passes to the local representatives of any inhabitant of the city or descends to his heirs upon his death; partition cannot be made of the real estate among the inhabitants in any manner known to law. Such property has not the incidents or qualities of private property attaching to property recognized as private among individual owners of property. When a citizen of Wilmington removes from the city he ceases to have any interest in the use of the property as one of the corporators. When a person from the most distant part of the country moves into the city and becomes an inhabitant thereof he immediately becomes a corporator and entitled, as all other inhabitants, to an interest in the use of the property.

In the case cited from the Louisiana reports the property in respect to which that case arose was public and not private property, that is to say, it was property held and owned by the city for the use of its inhabitants. The legislature had attempted to grant to a private corporation the right to construct a railroad upon or across this property, not under proceedings in condemnation, but absolutely and in deprivation of the right of the city in its property, without providing that the private corporation should make compensation for the taking of it. Of course this could not legally be done; in one sense the property was private property, that is, property owned by the corporation for the public use of the inhabitants of the city. The inhabitants of a city, who are in fact the corporators under a charter creating a municipality, are a portion of that general public which constitute a State, and they are also that particular public which constitute a municipality. The municipi-

pality may hold property in which all the inhabitants of a State or of a county may be said to have an interest in some respect, but not as owners or proprietors. And it may also hold property in which the inhabitants of the municipality alone may properly be said to have an interest. Both classes of property are public. The one as to the people of the whole State or county, the other more particularly as to the inhabitants of the municipality. It is only in this sense that the words "public" and "private" can with propriety be applied to such property when held by a municipality. Although the property held for the municipality is in fact public as common to all the inhabitants of a city, it nevertheless may justly be said to be private property, as being such property as is exempt from being taken or applied to any other public use by the State, or by authority of the State, without compensation being made.

It was said in the course of the argument of the present case that the corporation of Wilmington owned a lot within the limits of the city, called the "sand lot." Now, if the legislature of this State had passed an act authorizing the Baltimore and Ohio Railroad Company to take any portion of this lot for the purpose of constructing their road, now in the course of construction through that city, without compensation, there could be no doubt that such an act would be unconstitutional as against the spirit of the Constitution, which declares that private property shall not be taken for public use without compensation being made. The lot would be considered private as belonging exclusively to the corporation, although the use for which it is held by the corporation is public, for the benefit of all the inhabitants of the city. And the title in fact is in all the corporators, that is, the inhabitants of the city. Had the Baltimore and Ohio Railroad Company attempted to construct their road across this lot there can be no doubt that the city would have been entitled to an injunction restraining them from so doing.

While the municipality of Wilmington exists as a corporation, endowed with the capacity of purchasing and holding property, it has a right as against every other corporation or person to the use and enjoyment of its property as freely and fully as a private person can hold and enjoy similar property; but city corporations are emanations of the supreme law-making power of the State, and they are established for the more convenient government of the people within their limits. In cities, for reasons partly technical and partly founded upon motives of convenience, the title of certain property is vested in the corporate body. It is not thereby shielded from the control to a certain extent of the legislature as the supreme law-making power of the State. While the corporation exists by authority of the State, authorized to purchase and hold property for the inhabitants of the city to be paid for by the taxes levied upon the inhabitants, it would not, in our opinion, be competent for the State to take away such property and give it to other corporations or persons. In case of condemnation for public purposes, as, for

instance, to enable the Baltimore and Ohio Railroad Company to construct a road across the lot referred to, it would not, we suppose, be competent for the legislature to direct that the condemnation money should be given to the corporation of the city of New Castle, or should be applied to any municipal purpose of that city. But suppose the sand lot owned by the city of Wilmington should become worthless to the city or not adapted to any municipal use and valuable only for sale to private persons for building purposes. Could it be doubted that the legislature might direct it to be sold and the proceeds be devoted to some municipal or public purpose within the city of Wilmington? The right to acquire the property by means of taxation was conferred upon the city that the property so acquired might be useful to the city, and we can imagine no limit to the control of the State over property so acquired consistent with the preservation of the property or of its proceeds for the uses and purposes for which it was acquired and for the benefit of those for whom it was acquired.

The constituting a board of commissioners for the management of the property of a municipal corporation for the benefit of the corporators is no diversion of the property from the purposes of its acquisition. No title is thereby divested, and no property is wrongfully taken. In the case of the water-works of the city of Wilmington, these works were not taken away from the city by the appointment of a board of commissioners to manage them; nor was their use diverted from its original purpose. Whether managed by the city council or by the board of commissioners appointed by the authority of the legislature, the uses and purposes of the water-works — the supply of water to the corporators or inhabitants of the city — will be the same; and while these purposes and objects continue the same we can see no violation by the act of the legislature of any equitable right of which the city may complain. . . .

We do not suppose that, if the powers conferred upon the board of water commissioners by the act of the legislature creating it had by that act been conferred on the council of Wilmington, any serious objection could or would have been made to the constitutionality of the act. If not, the controversy would be narrowed down to very small dimensions indeed. Has the city council of Wilmington any vested or constitutional rights as against the State to manage or control the water-works of the city of Wilmington, or to appoint agents or managers to control them? They are the mere creatures of the legislature, which can in a moment destroy, as in a moment it created them. The legislature can divest the council of any and every power and authority it possesses. It can direct that those powers should be exercised by any other department or agency of the city government, and it could even direct that the functions now performed by the city council should hereafter be performed by a like number of any other corporators of the city. . . .

We have no doubt that, should occasion arise for the exercise of the

power, the legislature of the State would have the right to declare that the city of Wilmington should have and maintain not only suitable water-works for the supply of the city with good and wholesome water, but should have and maintain a proper fire department and proper gas-works, for the protection of the city from fire and the proper lighting of the city, for the convenience, safety, and comfort of the inhabitants. They might authorize the levying of taxes upon the inhabitants of the city for the defraying of the expenses necessary for the accomplishment of these purposes, and they might appoint commissioners to do whatever was necessary to be done to effectuate the act. . . .

We deem it not improper, however, to say that in our opinion the affairs of a municipal corporation should generally be administered in accordance with the will of its inhabitants, who, it is reasonable to suppose, are better acquainted with what will conduce to their comfort, happiness, and prosperity than others possibly can be. Whether this act should have been passed by the legislature was a question to be determined solely by the legislature itself. We can determine only as to the constitutionality of what the legislature has done, and, in our opinion, the city of Wilmington, being a municipal corporation, all its powers under its charter are subordinate to the powers of the legislature. The legislature having the power to repeal its existence, necessarily has the power to alter, amend, or abolish any of the agencies through which the powers of the corporation are exercised, or to change them or to substitute others in their place. Although the water-works of the city may have been, prior to the passage of the act to establish a board of water commissioners, under the control and management of the city council in any manner whatever, which may have been exercised through any agencies whatever, it was competent for the legislature to alter and change that control, management, and agency as they might deem proper. Such alteration of control, management, and agency, provided the same was not a diversion of the object and purposes for which the water-works were established, would affect no vested right of the city or the corporation as against the State.

The rights of the corporators to the property being secured to them, and the property of the corporators being preserved for its original purposes, if such be the case, and we see nothing in the act establishing a board of water commissioners to the contrary, this court is not at liberty to declare the act itself unconstitutional.

The judgment below is therefore affirmed.

BROWN *et al.* v. CITY OF GALVESTON *97 *Texas*, 1. 1903

ACTION by citizens of Galveston, who own vehicles kept for public or private use or for hire, to have the city enjoined from enforcing certain ordinances imposing license dues or taxes upon owners of such vehicles.

From the plaintiff's allegations it appears that, by an act of the legislature which took effect July 8, 1901, the previous charters of Galveston were repealed and a new charter of incorporation granted. This charter vests the governmental power of the city in a board of five commissioners, of whom three including the president are to be appointed by the Governor and two are to be elected by the voters. Each commissioner must be a citizen of the United States and for five years next preceding his appointment or election a resident of the city. Each is to hold office for two years and until his successor is qualified. This board is to represent the city in all matters in which the former mayor and aldermen had represented it.

The act transfers to the new city all the water-works, sewerage plants, fire-engines, fire alarms, and all other property of the old city, and confers general power to pass ordinances, to levy and collect *ad valorem*, occupation and license taxes, etc.

Jas. B. and Chas. J. Stubbs, for appellants.

J. Z. H. Scott, for appellee.

BROWN, J. . . . The following questions are submitted to this court by the Court of Civil Appeals:

"(1) Did the city of Galveston have authority, under the act of the legislature approved April 18, 1901, granting it a new charter and repealing all pre-existing charters, to enact and enforce the ordinances by virtue of which the right to collect the license tax was claimed?

"(2) Were the charter and ordinances authorizing the collection of the tax in conflict with the provisions of the Constitution of this State on taxation?

"(3) Did the Court below err in sustaining the motion to dissolve the injunction and in dismissing the petition?"

The first question submitted to us involves the constitutionality of those sections and provisions of the charter of the city of Galveston which empower the Governor of the State to appoint three members of the governing board of commissioners for that city, and of those which invest that commission so constituted with the powers of mayor and board of aldermen. This question arose in the case of *Ex parte Lewis*, which was decided by the Court of Criminal Appeals of this State, reported in 73 S. W. 811. The majority opinion was delivered by the Honorable John N. Henderson, justice, and concurred in by the Honorable W. L. Davidson, presiding justice, of that court. Judge M. M. Brooks dissented from the opinion of the majority. In that case the

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majority held that the law which authorized the governor to make the appointment of the three commissioners was contrary to the Constitution of the State of Texas. The majority and dissenting opinion each show extensive research into the authorities, and contain able and elaborate arguments and discussion of the principles involved. Recognizing the equal authority and dignity of that court, we approach the investigation of the question with much hesitancy, because of the delicacy of the duty to be performed. We shall accord to the opinion of the majority in that case equal weight as an authority with that of any other court of last resort, and, because it is a court of co-ordinate powers with this, acting under authority derived from the same Constitution, we feel constrained to conform our opinion to that, if we can properly do so in the discharge of our duty. . . .

It is asserted by the appellant that the people of Galveston had the "inherent right" to select their own municipal officers and that the legislature had no power to authorize the governor of the State to appoint municipal officers for that city. This proposition seems to be supported by the majority opinion in the case of *Ex parte Lewis*, 73 S. W. 811, from which we quote. After citing a number of cases, the Court of Criminal Appeals said: "But the reasoning in all of the cases — those referred to as well as all others — to which our attention has been called, except *State of Nevada v. Swift*, 11 Nev. 134, strongly supports the proposition that, even without some express constitutional provision, neither the legislature nor the governor has the power to appoint the permanent officers of a municipality. In the cases cited it occurs to us that the real effect of the decisions was to establish the doctrine that in the absence of a grant of authority in the Constitution authorizing the appointment of such local officers by the legislature or the governor, this power was denied by implication arising from the history and traditions which time out of mind had conferred local self-government on municipalities." That honorable court drew its conclusion from the following cases: *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Allor v. Wayne Co., Auditors*, 43 Mich. 76; *Davock v. Moore* (Mich.), 63 N. W. 424, 28 L. R. A. 783; *Geake v. Fox*, 63 N. E. 19; *State v. Denny*, 118 Ind. 382. *People v. Hurlbut* is the cornerstone upon which this theory rests, and upon which all of the other decisions cited have been constructed. In that case three great jurists (Christiancy, Campbell, and Cooley) delivered separate opinions, and in the course of the discussion of the question which was before them each referred to the history and traditions of that State, in reference to municipal corporations, as throwing light upon and aiding in the construction of this provision of the constitution of that State. "Judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the legislature shall direct." The question before the court was whether the legislature had the power to appoint officers for a city or village, or should it have provided for the election by

the voters of such city or village, or for appointment of such officers by the municipal authorities. In discussing the question, the three eminent judges went elaborately into the history of municipal corporations in the State of Michigan, avowedly for the purpose of showing that the convention intended to preserve the rights, which had previously existed under their charters, of the people of cities and villages to elect or appoint their own local officers, and they used the facts to show that the language of the Constitution was intended to express that the legislature should provide for the appointments or election by the municipality, from which they implied a prohibition against the legislature making appointments of water and light commissioners for the city of Detroit. Each of the distinguished jurists was careful to state the ground upon which his opinion rested, that is, upon the true intent and meaning of the Constitution, in proof of which we quote from the opinion of Judge Cooley, as follows: "In view of these historical facts and of these general principles, the question recurs whether our State Constitution can be so construed as to confer upon the legislature the power to appoint, for municipalities, the officers who are to manage the property interests and rights in which their own people alone are concerned." The court in that case held that the Constitution forbade the legislature to enact such a law, except that in the organization of a city or village it might make provisional appointments of officers to hold until the people could elect those which were provided by the charter. A misconception of those opinions, and the purposes for which those able jurists referred to the history of corporations in that State, has led some courts into the use of very extravagant and sensational language upon the subject of "the inherent right" of a people to control their own local affairs when organized into municipal corporations. An examination of cases cited fails to show a single authoritative decision which upholds the doctrine announced by the Court of Criminal Appeals in *Ex parte Lewis*. In every case that we have been able to find, no matter what the judge may have said, the judgment of the court was finally rested upon some provision of the Constitution of that State, except the case of *State v. Moores*, 55 Neb. 480, which has been overruled by the Supreme Court of that State.

We have examined many authorities upon this question, and find but one case which directly negatives the proposition that is asserted in the opinion of the Court of Criminal Appeals, but all of the cases cited by us sustain appointments of municipal officers made by the governor. The case of *Redell v. Moores*, 88 N. W. 243, 55 L. R. A. 740, decided by the Supreme Court of Nebraska, directly overruled *State v. Moores*, before cited. Of the opinion delivered in the former case, the Supreme Court of Nebraska says: "The majority opinion, to our minds, introduces a new principle into our system of jurisprudence, and one pregnant with mischievous consequences. We have been taught to regard the State and Federal constitutions as the sole test by which the

validity of acts of the legislature are to be determined. If the majority opinion in that case is to stand as the law of the State, then in addition to such test there is another — an illusive something, elastic and uncertain as an unwritten constitution, which may be invoked to defeat the legislative will. We cannot believe that such a principle should receive the final sanction of this court." From the many authorities which support the position of the Nebraska court, we cite: *Newport v. Horton*, 22 R. I. 196; *Americus v. Perry*, 114 Ga. 871; *Harris v. Wright*, 121 N. C. 172; *Philadelphia v. Fox*, 64 Pa. 169; *State v. Hunter*, 38 Kan. 578; *Luehrman v. Taring District*, 2 Lea, 425; *People v. Draper*, 15 N. Y. 532; *Nevada v. Swift*, 11 Nev. 128.

In our own State the doctrine is well settled that a municipal corporation can exist only by and through an act of the legislature of the State, and that it has no power not granted by the charter, and can have no officer not provided for by law. *Blessing v. Galveston*, 42 Tex. 641; *Pye v. Peterson*, 45 Tex. 312; *Vosburg v. McCrary*, 77 Tex. 568. But the doctrine of vested rights and powers, derived from "history and traditions," asserts a higher law than the Constitution; for if, in the absence of a prohibition, the legislature cannot enact a law in contravention of "history and traditions," the convention could not by express provision have authorized it to be done. The legislature of Texas may exercise any power that could be exercised by a constitutional convention except wherein the Constitution contains a prohibition, expressed or implied. According to the theory advocated, an unorganized community has rights which cannot be enjoyed, and powers which cannot be used, until those rights are conferred and the powers are granted by the State in the form of a charter. Yet the dormant rights and powers are protected by "history and traditions," which are thus made superior to the creative power.

In the case of *State v. McAllister*, 88 Tex. 284, section 3 of article 6 of the Constitution of this State was under examination, but with a view to determine another question; and in the discussion of that question the Court referred to the fact that, before the present Constitution was adopted, corporations existed with certain forms of government, which was considered by the court in reaching the conclusion that the convention did not intend to overturn the existing municipal corporations in the State; and, in view of the facts, the language of that section of the constitution was construed so as to harmonize with conditions that existed at the time of its adoption. It was not said nor intimated that municipal corporations existed in this State before the organization of the State government or the government of the Republic. In fact, there were no such municipalities within the territory constituting this State, and we have no such traditions nor history connected with the municipal corporations to influence the court in determining the meaning of any provision of the Constitution upon that subject.

The doctrine contended for is antagonistic to the fundamental prin-

ciples of our State government, as we understand them. . . . The doctrine is in conflict with the well-settled principle of constitutional construction that the power of the legislature can be restrained only by a prohibition expressed or implied from some provision or provisions of the Constitution itself. *Lytle v. Halff & Bro.* before cited. *Harris Co. v. Stewart*, 91 Tex. 143. The doctrine rests upon a basis, which is opposed to the well-settled rule of construction, that a law which is passed by the legislature of a State cannot be set aside by the courts because it is in conflict with the principles of natural justice, nor because of its conflict with the spirit of the Constitution. *Cooley, Const. Lim.*, 205. That author says: "Nor are the courts at liberty to declare an act void because in their opinion it is opposed to a spirit supposed to pervade the constitution, but not expressed in words." It contradicts the truth of the history of municipal corporations in Texas, for it is a matter of common knowledge that charters are formulated by the people of the towns presented by their representatives to the legislature, and, in case of opposition, committees attend upon the legislature to secure the wish of the majority. The city of Galveston had two representatives in the House and one in the Senate that enacted this law, and the bill was introduced in the House by one of her representatives, and supported by all. To overthrow the charter of that city, upon the assumption of a "history and tradition" which have no real existence, would in fact deny to the people of Galveston the right to govern their affairs in their own way, and thereby to substitute a form of municipal government dictated by the courts. In fact, this theory is out of harmony with the practices of republican State governments in America, and opens up a broad field in which to search for grounds to declare laws of a legislature void, without the shadow of authority in the well-established powers of the courts under our Constitution. As said by the court in *Redell v. Moores*, before cited, it is "an illusive something, elastic and uncertain as an unwritten constitution, which may be invoked to defeat the legislative will." "The doctrine" furnishes no standard or rule by which to determine the validity of any law framed by the legislature, but leaves each judge to try it according to his own judgment of what constitutes the "history and traditions" of the State, and what rights have been vested in the people by reason of such "history and traditions." To this theory we cannot give our consent, but must adhere to the well-established rules of construction which confine the court to the Constitution as the standard by which it is to determine the validity of legislative enactments. . . .

To the first and second questions we answer that the city of Galveston had authority under its charter to enact and enforce the ordinances which are brought in question in this action, and that the said ordinances are not in conflict with the provisions of the constitution of this State on taxation. To the third question we answer that the court did not err in sustaining the motion to dissolve the injunction and dismissing the petition.

TOWNSHIP OF BERNARDS *v.* ALLEN *et al.**
SAME *v.* POST *et al.*

61 N. J. L. 228. 1897

WRIT OF ERROR sued out by the township to review a judgment of the Supreme Court, rendered on *certiorari* brought by taxpayers to review a levy of taxes by the commissioners of taxation of the township.

The commissioners were appointed by the governor under an act passed in 1884 (Gen. Stat., p. 3411). That act provides that, if the local authorities shall neglect or fail to levy taxes for the purposes specified in section 5 of the act, or if there be a vacancy in the local boards or officers, or if the latter have not commenced the assessment or valuation of property, or if the taxes have not been levied at the time required by law, "it shall be the duty of the governor, upon notice to the local authorities, to appoint and commission three freeholders, who shall be residents of such city, town, or municipality, to be known as commissioners of taxation," whose duty it shall be to assess and levy the taxes specified in section 5, and to discharge all other duties therein required. The fifth section enacts that the commissioners "shall have power to levy taxes for such sums as they shall deem expedient for the following and no other purposes: 1. For the support of public schools and the repair of school houses. 2. For protecting property within such city, town, or municipality from fire. 3. For the protection and maintenance of the public health within such city, town, or municipality. 4. For the maintenance and support of the poor. 5. For the support and maintenance of a police force within such city, town, or municipality. 6. For keeping the highways and streets within the limits of such city, town, or municipality in a safe condition for public use. 7. For the expenses of assessing and collecting the taxes levied under this act, and in addition thereto a sum to meet deficiencies not exceeding ten per cent of the sums required to be raised for the above-stated purposes."

At the annual town meeting of the township, duly held in March, 1893, \$1,200 was voted to be raised for support of the poor, \$4,000 for roads, and \$500 for removal of snow. On application to the governor, pursuant to the provisions of the above statute, he appointed these commissioners of taxation, who made a new levy as follows: \$2,000 for the protection and maintenance of public health, \$2,300 for the maintenance and the support of the poor, \$324 for the support and maintenance of a police force, \$14,000 for keeping the highways and streets in a safe condition for public use, and \$1,700 for the expense of assessing and collecting such taxes and to meet deficiencies, in all \$21,124, instead of \$5,700, the total amount voted by the town meeting. The appointment of the commissioners appears to have been made on the

two grounds that the township authorities — that is, the town meeting of the township — had not made adequate provision for taxation for the purposes mentioned in the fifth section of the act, and that there was also a vacancy in the office of assessor.

On the hearing of the *certiorari* the Supreme Court excised so much of the levy of the commissioners as exceeded the amounts appropriated by the town meeting for supporting the poor and for keeping highways in a safe condition, on the ground that the town meeting had performed its duty in relation to the poor and roads of the township, and consequently the commissioners, under the statute referred to, had no power to levy taxes for those purposes. The court also excluded the levy of the commissioners for the support of a police force, for the reason that no police force had been established in the township. The court allowed the levy of the commissioners for the protection of public health to stand, on the ground that it was the duty of the voters of the township, at the town meeting, to provide for raising funds for these purposes. The levy of the commissioners to meet the expense of assessing and collecting the taxes imposed by them and to meet deficiencies was reduced to the sum of \$200.

For the plaintiffs in error, *Richard V. Lindabury*.

For the defendants in error, *Francis E. Marsh* and *Frank B. Allen*.

DEPUE, J. . . . On the argument of the writ of error, this court of its own motion directed that the case should be re-argued on the constitutionality of the Act of 1884, and the case was accordingly re-argued on constitutional grounds. [The court reviewed the history of taxation in England and early America to show that the right to levy taxes is appropriate only to the popular representatives in the legislature.]

As already observed, the right of taxation is vested in the people; but legislation is necessary to exercise the right of taxation. Under our form of government this legislative power is lodged, in the first instance, in the legislature of the State. The legislature, in the exercise of its sovereign power, may confer upon the minor political subdivisions of the State (which are merely instrumentalities for the better administration of the government in matters of local concern), power to impose and levy local rates, taxes and assessments to provide the revenue by which municipal expenses are borne and debts and liabilities paid, on the principle that for local purposes the local authorities are the representatives of the people. The powers conferred on boards of chosen freeholders in the counties, and upon other political subdivisions, such as cities, towns, townships, etc., are instances in which this legislative power has been conferred upon minor subdivisions of the State. The townships, from an early period, were accustomed to regulate their local affairs and provide means for local purposes by a vote of the inhabitants assembled in town meeting, probably, in the first instance, without statutory authority. [The court then reviewed

historically the statutes which conferred the power of taxation upon the townships.]

The legislation just referred to constituted the qualified voters of the township assembled in town meeting the legislative body by which the affairs of the township were administered, and invested the town meeting with power to appropriate and raise moneys by taxation for local purposes.

Except as the legislature of the State may confer upon political divisions powers to legislate and to provide revenue for defraying the expenses of the local governments, it has no power to delegate the power of taxation to ministerial officers or to another department of government. *Cooley, Tax.*, p. 47; 25 *Am. & Eng. Ency. L.*, 79, 186. It may provide for the appointment of officers and other persons to assess and collect taxes, but the essential power of taxation, which is the power to levy a tax, is incapable of being delegated by the legislature.

Every system of taxation consists of two parts — one the levying of taxes, the imposition of taxes on persons or property; the other the assessment and collection of taxes. The first is a legislative function controlled by constitutional prescriptions; the other, the assessment and collection of taxes, is mere machinery by which the legislative purpose is effectuated. Whether taxes shall be assessed and collected by officers elected by the people, called assessors and collectors, or by officers holding office under some other authority, is left to legislative discretion. *Trustees of Public Schools v. Trenton*, 3 *Stew. Eq.* 667, 678. "The legislature must prescribe the rule under which taxation shall be laid, and originate the authority under which taxing officers assess and collect the taxes; it need not prescribe all the details or fix with precision the sum to be raised. If the rule is prescribed which, in its administration, works out the result, that is sufficient; but to refer the making of the rule to another authority would be in excess of legislative power. To leave to a State officer or board the power to determine whether a tax should be laid for the current year, or at what rate, or upon what property, prescribes no rule and originates no authority; it merely attempts to empower some other tribunal to prescribe a rule and set in motion the tax machinery. This is clearly incompetent." *Cooley, Tax.*, p. 50.

The legislature, having prescribed a rule of taxation, may entrust the assessment and collection of taxes, in conformity with prescribed rules, to officers appointed by other authority. . . . But the essential power of taxation, the power to levy a tax, cannot be delegated by the legislature. In *State v. Sickels*, 4 *Zab.* 125, the Supreme Court held that a resolution of a town meeting to raise for general township expenses as much as the township committee should direct, "ways and means left to the committee," was illegal as a delegation of the taxing power which the town meeting could not delegate or transfer to the township committee or any other officer. In *State v. Koster*, 9 *Vroom*,

308, it was decided that a vote of the town meeting "for notes and bonds to be left to the town committee" was illegal. It appeared in that case that there were outstanding notes and bonds made by the township. The court held that if the vote of the town meeting had authorized the raising of money to pay such notes, leaving the calculation of the amount to the committee, as the amount ordered to be raised could be made certain by mere computation, the action of the town meeting would have been legal, but that a resolution to leave the amount to be raised in the discretion of the town committee was unauthorized. In *Munday v. Rahway*, 14 Vroom, 339, 347, an act by which the court was required to determine what rate of taxation could be imposed on a corporation without injury to the interests of its creditors, was held to be invalid, on the ground that it conferred upon the courts a purely legislative function. These decisions are precedents in our own courts, affirming the want of power in the legislative body in which the power of taxation is vested, to delegate the authority to others to determine in its judgment or discretion the amount to be raised by taxation. . . .

This act does not purport in any sense to confer on local municipal bodies powers of taxation. Its legal effect is to delegate the powers mentioned in the act to three persons appointed by the governor. In making this delegation the legislature prescribed no rule by which the taxation should be laid. The power conferred upon the commissioners was in express words the "power to levy taxes," with no prescription or limitation, except that the taxes levied for any one year for all purposes should not exceed one and one-quarter per cent, and commits to the judgment and discretion of the commissioners the right to determine whether taxes for the purposes mentioned should be laid, and at what rate and upon what property, as they might deem expedient. Plainly the scheme of taxation devised by this act is a delegation of the power of taxation. A decision which would sustain this legislative action would antagonize fundamental principles of constitutional law and in effect overrule *State v. Sickels*, *State v. Koster*, and *Munday v. Rahway*, above cited. In this respect the act is unconstitutional.

Some of the sections provide for the performance of mere ministerial duties in the assessment of taxes — duties which the legislature, having perfected a scheme of taxation, may delegate to other persons. Whether these sections can be separated from the main provisions of the act, and sustained as in themselves an exercise of competent legislative authority within the doctrine laid down by this court in *Johnson v. State*, 30 Vroom, 535, need not be decided in this case. The writ of *certiorari* was allowed on condition that taxes assessed in compliance with the vote of the town meeting should first be paid, and the same were paid, and persons assessed for such taxes have not taken out writs of error, and no reason appears on this record which would present that question for decision. The result is that the judgment of the

Supreme Court, in so far as it sustains the assessment of taxes voted at the town meeting, should be affirmed, and with respect to the assessment of taxes beyond the amount so voted it should be reversed. [For affirmance there were four judges; for reversal, and disposition according to the opinion, there were eleven.]¹

4. *Property and Debts as Affected by a Transfer of Territory*

LARAMIE COUNTY. v. ALBANY COUNTY

92 U. S. 307. 1875

APPEAL from the Supreme Court of the Territory of Wyoming.

MR. JUSTICE CLIFFORD. . . . Sufficient appears to show that the complainant county was first organized under the act of the 3d of January, 1868, passed by the legislature of the Territory of Dakota, which repealed the prior act to create and establish that county. When organized, the county was still a part of the territory, and embraced within its territorial limits all the territory now comprising the counties of Laramie, Albany and Carbon, in the territory of Wyoming, — an area of three and one-half degrees from east to west, and four degrees from north to south. Very heavy expenses, it seems, were incurred by the county during that year and prior thereto, greatly in excess of their current means, as more fully explained in the bill of complaint, which increased the indebtedness to the sum of \$28,000. Other liabilities, it is alleged, were also incurred by the authorities of the county during that period, which augmented their indebtedness to the sum of \$40,000 in the aggregate.

Pending these embarrassments, the charge is, that the legislature of the territory passed two acts on the same day, — to wit, Dec. 16, 1868, — creating the counties of Albany and Carbon out of the western portion of the territory of the complainant county, reducing the area of that county more than two-thirds; that, by the said acts creating said new counties, fully two-thirds of the wealth and taxable property previously existing in the old county were withdrawn from its jurisdiction, and its limits were reduced to less than one-third of its former size, without any provision being made in either of said acts that the new counties, or either of them, should assume any proportion of the debt and liabilities which had been incurred for the welfare of the whole before these acts were passed.

¹ See *State v. Mayor, etc. of Des Moines, supra*, p. 21, and cases cited.

Payment of the outstanding debt having been made by the complainant county, the present suit was instituted in her behalf to compel the new counties to contribute their just proportion towards such indebtedness. Attempt is made to show that an equitable cause of action exists in the case by referring to the several improvements made in that part of the territory included in the new counties before they were incorporated, and by referring to the great value of the property withdrawn from taxation in the old county, and included within the limits of the newly-created counties.

Process was served, and the respondents appeared and filed separate demurrers to the bill of complaint. Hearing was had in the District Court of the territory, where the suit was commenced; and the court entered a decree sustaining the demurrers, and dismissing the bill of complaint. Immediate appeal was taken by the complainant to the Supreme Court of the Territory, where, the parties having been again heard, the Supreme Court entered a decree affirming the decree of the District Court, and the present appeal is prosecuted by the complainant.

Two errors are assigned, as follows: (1.) That the Supreme Court erred in affirming the decree of the District Court sustaining the demurrers of the respondents to the bill of complaint. (2.) That the Supreme Court erred in rendering judgment for the respondents. . . .

Sixty-five years before the decree under review was rendered, a case was presented to the Supreme Court of Massachusetts, sitting in Maine, which involved the same principle as that which arises in the case before the court. Learned counsel were employed on both sides, and Parsons was Chief Justice of the court, and delivered the opinion. First he adverted to the rights and privileges, obligations and duties, of a town, and then proceeded to say, "If a part of its territory and inhabitants are separated from it by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights, and privileges, and remains subject to all its obligations and duties, unless some new provision should be made by the act authorizing the separation." *Windham v. Portland*, 4 Mass. 389.

Decisions to the same effect have been made since that time in nearly all the States of the Union where such municipal subdivisions are known, until the reported cases have become quite too numerous for citation. Nor are such citations necessary, as they are all one way, showing that the principle in this country is one of universal application. Concede its correctness, and it follows that the old town, unless the legislature otherwise provides, continues to be seized of all its lands held in a proprietary right, continues to be the sole owner of all its personal property, is entitled to all its rights of action, is bound by all its contracts, and is subject to all the duties and obligations it owed before the act was passed effecting the separation.

Suppose that is so as applied to towns: still it is suggested that the same rule ought not to be applied to counties; but it is so obvious that

the suggestion is without merit, that it seems unnecessary to give it any extended examination. *County of Richland v. County of Lawrence*, 12 Ill. 8.

Public duties are required of counties as well as of towns, as a part of the machinery of the State; and, in order that they may be able to perform those duties they are vested with certain corporate powers; but their functions are wholly of a public nature, and they are at all times as much subject to the will of the legislature as incorporated towns, as appears by the best text-writers upon the subject and the great weight of judicial authority.

Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact. Instead of that, the constant practice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests, as understood by those who control the action of the legislature. Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at its pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. *School Society v. School Society*, 14 Conn. 469; *Bridge Co. v. East Hartford*, 16 id. 172; *Hampshire v. Franklin*, 16 Mass. 76; *North Hempstead v. Hempstead*, 2 Wend. 109; *Montpelier v. East Montpelier*, 29 Vt. 20; *Sill v. Corning*, 15 N. Y. 197; *People v. Draper*, id. 549; *Waring v. Mayor*, 24 Ala. 701; *Mayor v. The State*, 15 Md. 376; *Ashby v. Wellington*, 8 Pick. 524; *Baptist Society v. Candia*, 2 N. H. 20; *Denton v. Jackson*, 2 Johns. Ch. 320.

Political subdivisions of the kind are always subject to the general laws of the State; and the Supreme Court of Connecticut decided that the legislature of the State have immemorially exercised the power of dividing towns at their pleasure, and upon such division to apportion the common property and the common burdens as to them shall seem reasonable and equitable. *Granby v. Thurston*, 23 Conn. 419; *Yarmouth v. Skillings*, 45 Me. 142; *Langworth v. Dubuque*, 16 Iowa, 273; *Justices' Opinion*, 6 Cush. 577.

Such corporations are the mere creatures of the legislative will; and, inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even without notice. They are but subdivisions of the State, deriving even their existence from the legislature. Their officers are nothing more than local agents of the State; and their powers may be revoked or enlarged and their acts may be set aside or

confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated. *Russell v. Reed*, 27 Penn. St. 170.

Civil and geographical divisions of the State into counties, townships, and cities, said Thompson, C. J., had its origin in the necessities and convenience of the people; but this does not withdraw these municipal divisions from the supervision and control by the State in matters of internal government. Proof of that is found in the fact that the legislature often exercises the power to exempt property liable to taxation, and in many other instances imposes taxes on what was before exempt, or increases the antecedent burdens in that behalf. It changes county sites, and orders new roads to be opened and new bridges to be built at the expense of the counties; and no one, it is supposed, disputes the exercise of such powers by the legislature. *Burns v. Clarion County*, 62 Penn. St. 425; *People v. Pinkney*, 32 N. Y. 393; *St. Louis v. Russell*, 9 Mo. 507.

Old towns may be divided, or a new town may be formed from parts of two or more existing towns; and the legislature, if they see fit, may apportion the common property and the common burdens, even to the extent of providing that a certain portion of the property of the old town shall be transferred to the new corporation. *Bristol v. Chester*, 3 N. H. 524.

In dividing towns, the legislature may settle the terms and conditions on which the division shall be made. It may enlarge or diminish their territorial liabilities, may extend or abridge their privileges, and may impose new liabilities. "Towns," says Richardson, C. J., "are public corporations, created for purposes purely public, empowered to hold property, and invested with many functions and faculties to enable them to answer the purposes of their creation."

There must, in the nature of things, be reserved, by necessary implication, in the creation of such corporations, a power to modify them in such manner as to meet the public exigencies. Alterations of the kind are often required by public convenience and necessity; and we have the authority of that learned judge for saying that it has been the constant usage, in all that section of the Union, to enlarge or curtail the power of towns, divide their territory, and make new towns, whenever the convenience of the public requires that such a change shall be made.

Half a century ago, when that decision was made, the authority of the legislature to make such a division of a municipal corporation was deemed to be without doubt; and the same court decided that the power to divide the property of a municipal corporation is necessarily incident to the power to divide its territory and to create the new corporation. *Darlington v. Mayor*, 31 N. Y. 195; *Clinton v. Railroad*, 24 Iowa, 475; *Layton v. New Orleans*, 12 La. Ann. 516.

Cases doubtless arise where injustice is done by annexing part of one municipal corporation to another, or by the division of such a corpo-

ration and the creation of a new one, or by the consolidation of two or more such corporations into one of larger size. Examples illustrative of these suggestions may easily be imagined. (1.) Consolidation will work injustice where one of the corporations is largely in debt and the other owes nothing, as the residents in the non-indebted municipality must necessarily submit to increased burdens in consequence of the indebtedness of their associates. (2.) Like consequences follow where the change consists in annexing a part of one municipal corporation to another, in case the corporation to which those set off are annexed is greatly more in debt than the corporation from which they were set off.

Hardships may also be suffered by the corporation from which a portion of its inhabitants, with their estates, may be set off, in case the corporation is largely in debt, as the taxes of those who remain must necessarily be increased in proportion as the polls and estates within the municipality are diminished. Even greater injustice may arise in cases where the legislature finds it necessary to circumscribe the jurisdiction of a county or town by dividing their territory, and creating new counties or towns out of the territory withdrawn from their former boundaries.

Legislative acts of the kind operate differently under different circumstances. Instances may be given where the hardship is much the greater towards the new municipality, as where the great body of the property and improvements are left within the new boundaries of the old corporation. Other cases are well known where the hardship is much greater towards the old corporation, as where the newly-created subdivision embraces within its boundaries all the public buildings and most of the public improvements and the most valuable lands. Circumstances of the kind, with many others not mentioned, show beyond doubt that such changes in the subdivisions of a State often present matters for adjustment involving questions of great delicacy and difficulty.

Allusion was made to this subject by the Supreme Court of New Hampshire in the case to which reference has already been made. 3 N. H. 524. Speaking of the power to divide towns, the court in that case say that the power in that regard is strictly legislative; and that the power to prescribe the rule by which a division of the property of the old town shall be divided is incident to the power to divide the territory, and is *in its nature purely legislative*. No general rule can be prescribed by which an equal and just decision in such cases can be made. Such a division, say the court in that case, must be founded upon the circumstances of each particular case; and in that view the court here entirely concurs. *Powers v. Commissioners of Wood County*, 8 Ohio St. 290; *Shelby County v. Railroad*, 5 Bush, 228; *Olney v. Harvey*, 50 Ill. 455.

Regulation upon the subject may be prescribed by the legislature; but, if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such

regulation, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay, without any claim for contribution; and the new subdivision has no claim to any portion of the public property except what falls within her boundaries, and to all that the old corporation has no claim. *North Hempstead v. Hempstead*, 2 Wend. 134; *Dill. on Mun. Corp.*, Sect. 128; *Wade v. Richmond*, 18 Gratt. 583; *Higginbotham v. Com.*, 25 id. 633.

Tested by these considerations, it is clear that there is no error in the record.

Decree affirmed.

TOWN OF MOUNT PLEASANT *et al. v. BECKWITH* *

100 U. S. 514. 1879

APPEAL from the U. S. Circuit Court for the Eastern District of Wisconsin. Bill in equity against the town of Mount Pleasant, the town of Caledonia, and the city of Racine, brought by Beckwith to enforce payment of certain bonds issued by the town of Racine in 1853, under legislative authority.

In 1859, the name of the town of Racine was changed to Orwell. In 1860, the legislature abolished the town of Orwell, and annexed a part of its territory to Caledonia and the rest to Mount Pleasant; but the act did not provide for the apportionment, or the payment, of the indebtedness of Orwell. In 1871, the legislature passed an act separating a portion of the territory which had been annexed to Mount Pleasant, and annexing it to the city of Racine. That act provided that the city of Racine "shall assume and pay so much of the indebtedness of the town of Racine as the lands described in the first section of the act may be or become legally chargeable with and liable to pay."

Demurrers were filed by the defendants but were overruled. Answers were filed, and the case was referred to a master, who found the valuation of the taxable property which each defendant had received from the town of Orwell, and the proportion which it bore to the full amount of taxable property formerly within the territory of that town. The court decreed that each defendant should pay a portion of the amount of the bonds of the town of Racine equivalent to the portion of the taxable property of the town of Racine annexed to its territory. The town of Mount Pleasant and the town of Caledonia appealed.

L. S. Dixon and John T. Fish, for appellants.

William P. Lynde, for appellees.

CLIFFORD, J. . . . It follows that the only question open in the case for examination is, whether the other two respondent municipal corporations are liable to any extent for the debts of the extinguished

municipality, portions of whose territory were transferred by the legislature into their respective jurisdictions. We say, liable to any extent, because the question of amount was submitted to the master, and the record shows that neither of the appellants excepted to the master's report. *Gordon v. Lewis*, 2 Sum. 143; *McMicken v. Perin*, 18 How. 507 (59 U. S. XV, 504). Nor do either of the assignments of error allege that the master committed any error in that regard. *Brockett v. Brockett*, 3 How. 691.

Viewed in that light, as the case should be, it is clear that if the appellants are liable at all, they are liable for the respective amounts specified in the decree. *Harding v. Handy*, 11 Wheat. 103; *Story v. Livingston*, 13 Pet. 359.

Where one town is by a legislative act merged in two others, it would, doubtless, be competent for the legislature to regulate the rights, duties, and obligations of the two towns whose limits are thus enlarged; but if that is not done, then it must follow that the two towns succeed to all the public property and immunities of the extinguished municipality. *Morgan v. Beloit*, 7 Wall. 613, 617 (74 U. S. XIX, 203, 204).

It is not the case where the legislature creates a new town out of a part of the territory of an old one, without making provision for the payment of the debts antecedently contracted, as in that case it is settled law that the old corporation retains all the public property not included within the limits of the new municipality, and is liable for all the debts contracted by her before the act of separation was passed. *Depere v. Bellevue*, 31 Wis. 120, 125.

Instead of that, it is the case where the charter of one corporation is vacated and rendered null, the whole of its territory being annexed to two others. In such a case, if no legislative arrangements are made, the effect of the annulment and annexation will be that the two enlarged corporations will be entitled to all the public property and immunities of the one that ceases to exist, and that they will become liable for all the legal debts contracted by her prior to the time when the annexation is carried into operation.

Speaking to the same point, the Supreme Court of Missouri held that where one corporation goes entirely out of existence by being annexed to or merged in another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property and be answerable for all the liabilities. *Thompson v. Abbott*, 61 Mo. 176, 177.

Grant that; and it follows that when the corporation first named ceases to exist there is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness. Its property passes into the hands of its successor, and when the benefits are taken the burdens are assumed, the rule being that the successor who takes the benefits must take the same *cum onere*, and that the successor town is thereby estopped to deny that she is liable to respond for the attendant burdens.

Swain v. Seamens, 9 Wall. 254, 274 (76 U. S. XIX, 554, 560); *Pickard v. Sears*, 6 Ad. & El. 474.

Powers of a defined character are usually granted to a municipal corporation, but that does not prevent the legislature from exercising unlimited control over their charters. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether, in the legislative discretion, and substitute in their place those which are different. *Cooley, Const. Lim.*, 4th ed. 232.

Municipal corporations, says Field, J., so far as they are invested with subordinate legislative powers for local purposes, are mere instrumentalities of the State for the convenient administration of their affairs; but when authorized to take stock in a railroad company, and issue their obligations in payment of the stock, they are, to that extent, to be deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. *Broughton v. Pensacola*, 93 U. S. 266, 269 (XXIII, 896, 897).

Modifications of their boundaries may be made, or their names may be changed, or one may be merged in another, or it may be divided and the moieties of their territory may be annexed to others; but in all these cases, if the extinguished municipality owes outstanding debts, it will be presumed in every such case that the legislature intended that the liabilities as well as the rights of property of the corporation which thereby ceases to exist shall accompany the territory and property into the jurisdiction to which the territory is annexed. *Colchester v. Seaber*, 3 Burr. 1866.

Neither argument nor authority is necessary to prove that a State legislature cannot pass a valid law impairing the obligations of a contract, as that general proposition is universally admitted. Contracts under the Constitution are as sacred as the Constitution that protects them from infraction, and yet the defense in this case, if sustained, will establish the proposition that the effect of State legislation may be such as to deprive a party of all means of sustaining an action of any kind for its enforcement. Cases, doubtless, may arise when the party cannot collect what is due under the contract; but he ought always to be able, by some proper action, to reduce his contract to judgment.

Suppose it be admitted that the act of the State legislature annulling the charter of the municipality indebted to the complainant, without making any provision for the payment of outstanding indebtedness, was unconstitutional and void, still it must be admitted that the very act which annulled that charter annexed all the territory and property of the municipality to the two appellant towns, and that they acquired with that the same power of taxation over the residents and their estates that they previously possessed over the estates of the inhabitants resident within their limits before their boundaries were enlarged.

Extinguished municipal corporations neither own property nor have they any power to levy taxes to pay debts. Whatever power the extinguished municipality had to levy taxes, when the act was passed annulling her charter, terminated, and from the moment the annexation of her territory was made to the appellant towns, the power to tax the property transferred, and the inhabitants residing on it, became vested in the proper authorities of the towns to which the territory and jurisdiction were by that act transferred; from which it follows that, for all practical purposes, the complainant was left without judicial remedy to enforce the collection of the bonds or to recover judgment for the amounts they represent.

When the appellant towns accepted the annexation, their authorities knew or ought to have known that the extinguished municipality owed debts, and that the act effecting the annexation made no provision for their payment. They had no right to assume that the annulment of the charter of the old town would have the effect to discharge its indebtedness, or to impair the obligation of the contract held by its creditors to enforce the same against those holding the territory and jurisdiction by the authority from the legislature, and the public property and the power of taxation previously held and enjoyed by the extinguished municipality.

Express provision was made by the act annulling the charter of the debtor municipality for annexing its territory to the appellant towns; and when the annexation became complete, the power of taxation previously vested in the inhabitants of the annexed territory as a separate municipality ceased to exist, whether to pay debts or for any other purpose — the reason being that the power, so far as respected its future exercise, was transferred with the territory and the jurisdiction over its inhabitants to the appellant towns, as enlarged by the annexed territory; from which it follows, unless it be held that the extinguishment of the debtor municipality discharged its debts without payment, which the Constitution forbids, that the appellant towns assumed each a proportionate share of the outstanding obligations of the debtor town when they acquired the territory, public property, and municipal jurisdiction over everything belonging to the extinguished municipality.

Corporations of a municipal character, such as towns, are usually organized in this country by special acts or pursuant to some general State law; and it is clear that their powers and duties differ in some important particulars from the towns which existed in the parent country before the Revolution, where they were created by special charters from the Crown, and acquired many of their privileges by prescription, without any aid from parliament. Corporate franchises of the kind granted during that period partook much more largely of the nature of private corporations than do the municipalities created in this country, and known as towns, cities, and counties. Power exists here in the legislature, not only to fix the boundaries of such a municipality

when incorporated, but to enlarge or diminish the same subsequently, without the consent of the residents, by annexation or set-off, unless restrained by the Constitution, even against the remonstrance of every property holder and voter within the limits of the original municipality.

Property set off or annexed may be benefited or burdened by the change, and the liability of the residents to taxation may be increased or diminished; but the question, in every case, is entirely within the control of the legislature, and, if no provision is made, everyone must submit to the will of the State, as expressed through the legislative department. Inconvenience will be suffered by some, while others will be greatly benefited in that regard by the change. Nor is it any objection to the exercise of the power, that the property annexed or set off will be subjected to increased taxation, or that the town from which it is taken or to which it is annexed will be benefited or prejudiced, unless the Constitution prohibits the change, since it is a matter, in the absence of constitutional restriction, which belongs wholly to the legislature to determine. Courts everywhere in this country hold that, in the division of towns, the legislature may apportion the burdens between the two, and may determine the proportion to be borne by each. *Sill v. Corning*, 15 N. Y. 297; *Mayor v. State*, 15 Md. 376; *Olney v. Harvey*, 50 Ill. 453; *Borough of Dunmore's App.*, 52 Pa. 374.

Public property and the subordinate rights of a municipal corporation are within the control of the legislature; and it is held to be settled law that, where two separate towns are created out of one, each, in the absence of any statutory regulation, is entitled to hold in severalty the public property of the old corporation which falls within its limits.¹ *N. Hempstead v. Hempstead*, 2 Wend. 109; *Hartford Br. Co. v. E. Hartford*, 16 Conn. 149, 171.

Extensive powers in that regard are, doubtless, possessed by the legislature; but the Constitution provides that no State shall pass any "law impairing the obligation of contracts," from which it follows that the legislature, in the exercise of any such power, cannot pass any valid law impairing the right of existing creditors of the old municipality. 1 *Dill., Mun. Corp.*, 2d ed., § 41; *Van Hoffman v. Quincy*, 4 Wall. 535, 554 (71 U. S. XVIII, 403, 409); *Lee Co. v. Rogers*, 7 Wall. 181, 184 (74 U. S. XIX, 160, 161); *Butz v. Muscatine*, 8 Wall. 575, 583 (75 U. S. XIX, 490, 493); *Furman v. Nichol*, 8 Wall. 44, 62 (75 U. S. XIX, 370, 377).

Where a municipal corporation has the power to contract a debt, it has, says Dixon, C. J., by necessary implication, authority to resort to the usual mode of raising money to pay it, which, undoubtedly, is taxation. *Hasbrouck v. Milwaukee*, 25 Wis. 122, 133.

Whenever the charter of a city, at the time of the issue of bonds, made

¹ See *Bloomfield v. Glen Ridge*, 54 N. J. Eq. 276, where, upon the separation of part of the territory of a town and the erection thereon of a borough government, it was held that the sewer pipes and connections within the detached territory passed to the borough government.

it the duty of the city authorities to levy and collect the amount, when reduced to judgment, like other city charges, the same court held that a subsequent act of the legislature prohibiting the city from levying such a tax would be repugnant to the Constitution. *Soutter v. Madison*, 15 Wis. 30.

State control over the division of the territory of the State into cities, towns, and districts, unless restricted by some constitutional limitation, is supreme, but the same court admits that it cannot be exercised to annul another regulation of the Constitution. *Chandler v. Boston*, 112 Mass. 200; *Ops. of Justices, etc.*, 6 Cush. 580.

Cities or towns, whenever they engage in transactions not public in their nature, act under the same pecuniary responsibility as individuals, and are as much bound by their engagements as are private persons, nor is it in the power of the legislature to authorize them to violate their contracts. *Saving Soc. v. Philadelphia*, 31 Pa. 175, 185.

Text writers concede almost unlimited power to the State legislatures in respect to the division of towns and the alteration of their boundaries; but they all agree that in the exercise of these powers they cannot defeat the rights of creditors nor impair the obligation of a valid contract. 1 *Dill., Mun. Corp.*, § 128; *Blanchard v. Bissell*, 11 Ohio, 96; *Lansing v. Co. Treas.*, 1 *Dill. (C. C.)*, 522, 528.

✱ Concessions of power to municipal corporations are of high importance; but they are not contracts, and, consequently, are subject to legislative control without limitation, unless the legislature oversteps the limits of the Constitution. *Layton v. New Orleans*, 12 La. An. 515.

Bonds had been issued and used by a city for purchasing land for a park, which was pledged for the payment of the bonds; held, that a subsequent act of the legislature authorizing a sale of a portion of the park, free of all liens existing by virtue of the original act, was in violation of the Federal Constitution, as impairing the obligation of contracts. *Brooklyn Park Com. v. Armstrong*, 45 N. Y. 234, 247.

Laws passed by a State impairing the obligation of a contract are void, and if a State cannot pass such a law, it follows that no agency can do so which acts under the State with delegated authority. *Cooley, Const. Lim.*, 4th ed., 241; *A. & A. Corp.*, 9th ed., §§ 332, 333.

Municipal debts cannot be paid by an act of the legislature annulling the charter of the municipality, and, if not, then the creditors of such a political division must have some remedy after the annulment takes place. Without officers, or the power of electing such agents, a municipal corporation, if it can be so called, would be an entity very difficult to be subjected to judicial process or to legal responsibility; but when the entity itself is extinguished, and the inhabitants with its territory and other property are transferred to other municipalities, the suggestion that creditors may pursue their remedy against the original contracting party is little less than a mockery. Public property, with the inhabitants and their estates, and the power of taxation, having been

transferred by the authority of the legislature to the appellants, the principles of equity and good conscience require that, inasmuch as they are and have been for nearly twenty years in the enjoyment of the benefits resulting from the annexation, they shall in due proportions also bear the burdens. *New Orleans v. Clark*, 95 U. S. 644, 654 (XXIV, 521, 522).

Equitable rules of decision are sufficiently comprehensive in their reach to do justice between parties litigant, and to overcome every difficulty which can be suggested in this case. States are divided and subdivided into such municipalities, called counties, cities, towns, and school districts, and the legislature of every State is required every year to pass laws modifying their charters and enlarging or diminishing their boundaries. Nor are the questions presented in this case either new in principle or difficult of application. New forms are given to such charters in every day's experience, when the limits of an old corporation are changed by annexation of new territory, or portions of the territory of the old municipality are set off and annexed to another town. Both corporations, in such a case, continue, though it may be that the charters are much changed, and that the inhabitants of the territory annexed or set off fall under different officers and new and very diverse regulations. *Beckwith v. Racine*, 7 Biss. 142, 149.

Pecuniary burdens may be increased or diminished by the change; but, in the absence of express provisions regulating the subject, it will be presumed in every case where both municipalities are continued, that the outstanding liabilities of the same remain unaffected by such legislation. Unlike that, in this case the charter of the old town was vacated and annulled; from which it follows that the same principles of justice require that the appellant towns, to which the territory, property, and inhabitants of the annulled municipality were annexed, should become liable for its outstanding indebtedness.

Hearing was had in this case during the last term of this court and the case now numbered 283 was heard at the same time. Both cases, it is agreed by the parties, depend upon substantially the same facts, and, of course, they must be decided in the same way.¹

Decree in each case is affirmed.

MILLER, J., dissenting.

MR. JUSTICE FIELD, MR. JUSTICE BRADLEY, and myself are of opinion that it requires legislation to make a legal obligation against the new town, and make the apportionment of the debt; and we dissent, on that ground, from the judgment and from the opinion of the court in this case.

¹ "In *Mobile v. Watson*, 116 U. S. 289, it was held that when a municipal corporation with fixed boundaries is dissolved by law, and a new corporation is created by the legislature for the same general purposes, but with new boundaries, embracing less territory but containing substantially the same population; the great mass of the taxable property, and the corporate property of the old corporation which passes without consideration and for the same uses, the debts of the old corporation fall upon the new as its legal successor; and that powers of taxation to pay them, which it had at the time of their creation and which entered into the contracts, also survive and pass into the new corporation." *Shapleigh v. San Angelo*, 167 U. S. 646, at 653.

TOWN OF MONTPELIER v. TOWN OF EAST MONTPELIER *

27 Vt. 704. 1854

ASSUMPSIT to recover rents received by the defendants on leases of certain lots of land, which were formerly situated within the territory of the original town of Montpelier. They were granted to that town in 1781, in its original charter, for certain public uses; namely, the settlement of a minister or ministers of the gospel, the support of the worship of God, and the support of an English school or schools.

At trial, the plaintiffs relied on an Act of 1848, which declared the old town of Montpelier to be divided and incorporated into two distinct towns, Montpelier and East Montpelier; and which provided for a division of the property of the original town in proportion to the grand lists of the persons and property of the new towns. The evidence showed that after the division the lands were situated within the territory of East Montpelier. They had been leased before the division to individuals. The leases had been delivered to the treasurer of the present town of Montpelier, but the treasurer of East Montpelier had collected the rents.

The court ruled that the plaintiffs were entitled, under the Act of 1848, to a part of the rents in proportion to the grand lists of the towns; and rendered judgment accordingly. To that ruling both parties excepted.

J. A. Vail and Merrill & Willard, for the plaintiffs.

P. Dillingham and Peck & Colby, for the defendants.

BENNETT, J. . . . From the peculiar and explicit language of the act, it is clear that it was the intention of the legislature to make two *new* and distinct corporations; and the effect of this, from necessity, must be to abolish the old municipality, for we cannot suppose it was the intention of the legislature that the old municipality should continue to exist with a curtailed territory, and at the same time a new municipality be created and organized out of the same territory. If, by the act, the town had been simply divided, creating East Montpelier a new municipality out of a part of the territory included in the old town of Montpelier, the old municipality of Montpelier, might, by implication, have continued to exist with a curtailed territory. And this I think, has been the usual mode that has been adopted in the division of towns. We must regard this suit, then, as brought by the new municipality, known as Montpelier, and for all legal and substantial purposes the name is of no particular account. The question then is, can this action be maintained, either to recover the whole fund or a part of it? . . .

The individual inhabitants of the township, as incorporated in 1781, may be regarded as the *beneficiaries, or cestui que trusts*. All the right which the old municipality of Montpelier could have had to these

funds was as trustees, and to see them applied to the uses to which they had been assigned.

The question then is, can the new township of Montpelier, incorporated under the act of 1848, maintain this action. If they can, a recovery would not be for their own use, but in trust, for the uses specified in the original charter. To simplify the case, we may suppose the defendant to be an entire stranger to all interest in the funds. The fact that East Montpelier may set up a conflicting claim to some portion of them, or even to the whole, cannot alter the principles upon which the plaintiff's claim must rest.

If this action can be sustained, it must be entirely by force of the fourth section of the Act of 1848, creating two new municipal corporations.

It is not necessary to call in question the powers of the legislature over municipal corporations, and the funds which belonged to them as such, and which they hold for their own corporate purposes. No such questions are before us. The object of this suit is to test the right of the present town of Montpelier to manage and control trust funds which, by the terms of the grant creating them as contained in the charter of 1781, were, by the donors, declared to be under the charge, direction, and disposal of the inhabitants of said township forever. By this, as I understand it, is meant the inhabitants of the territory of Montpelier, as then chartered, but, as I now think, in their corporate capacity. The form of the gift in the original charter, is somewhat peculiar. An important inquiry then is, what should be the effect of the Act of 1848, upon the legal control of these trust funds? Did the legislature attempt to divide these funds into two fragments, and give the control of one to Montpelier and that of the other to East Montpelier? We apprehend the construction of the act should be such, as to operate only, upon such property, as belonged to the towns for their own municipal and corporate purposes. . . .

In *Harrison v. Bridgeton*, 16 Mass. 16, by the terms of the charter of the township of Bridgeton, one right was to be appropriated to the use of schools, and one right to the use of the ministry; and when the town of Harrison was incorporated out of a part of Bridgeton, and part out of an adjoining town, the act of incorporation provided for a division of all the property, rights and credits of the towns of Bridgeton, with the new town of Harrison; yet the court held, that the funds which were held in trust were not within the act. We are inclined to give the Act of 1848 a similar construction, otherwise, for one, I apprehend that the act providing for a division of the property of the town would be liable to constitutional objections.

There is nothing in the case to show any consent of the inhabitants of the old township to a division of these trust funds, between the two new corporations. If the fourth section of the Act of 1848 was to be so construed as to include property held in trust by the town, it might

not, it is true, divert the fund from the objects for which they were designed by the donors; yet its effect would be, to divide into two parts, what before was an entire fund, and create a new and several regency for each fragment, when the donors by their grant made it an entire fund, and placed it under a different regency from what the Act of 1848 would create for the control of each fragment.

In the *Dartmouth College Case*, Chief Justice Marshall well says, "that no authority exists in a government to regulate, control or divert a corporation or its funds, except where the corporation is, in the strictest sense, *public*, that is," he adds, "where the whole interests and franchises are the exclusive property and domain of the government itself." Although towns, may be regarded as public corporations, created for political purposes; and although the corporations themselves, and the property belonging to them as municipal corporations, may be subject to the control of the legislature; yet if made the almoners of a charity, or the guardians of a trust fund, it by no means follows that the legislature can alter or change the trust.

In the *Dartmouth College Case v. Woodward*, 4 Wheat. 518, there was no attempt to pervert the funds of the college to a use different from the one to which they had been assigned by the donors. The only object of the statute of the New Hampshire legislature was to change the regency of those funds, and yet the law was held unconstitutional.

So in the case of the *Commonwealth ex rel. Claghorn et al. v. Cullen et al.*, 1 Harris 133, it was held that an act increasing the number of trustees and changing the time of their election without the assent of the corporation was not a valid act. See also *Brown v. Hummell*, 6 Barr 86.

The case of the *Trustees of the New Gloucester School Fund v. Wm. Bradbury*, 2 Fairfield 118, is quite analogous to what the case before us would have been, had the fourth section of the Act of 1848 extended in its terms, to include the trust funds now in dispute. In that case, an act of the legislature, authorizing the town to choose a new set of trustees for the school fund, and directing the first trustees to deliver over the trust property to them, was held unconstitutional. The school fund had the effect to reduce the sum to be raised and collected by taxation for the support of schools in the town, and in this way the town had a beneficial interest in the funds of the corporation, and brought the case, it is said, within the very language of the court in the case of *Dartmouth College v. Woodward*. The court repudiated an attempt to distinguish between the two cases upon the ground that New Gloucester was a municipal corporation.

[*Poultney v. Wells*, 1 Aik. 180, and *Plymouth v. Jackson*, 15 Penn. 44, reviewed.]

The effect of the Act of 1848, of our legislature, being to abolish the trustee of these funds, created by the charter of 1781, and the Act of 1848 being inoperative, to create a valid division of the funds between

the two new towns, it must follow that this action cannot be sustained. The new township of Montpelier has no legal interest in the funds, vested in them as trustees.

The judgment of the county court is reversed, and the cause remanded.

[REDFIELD, C. J., did not sit.]¹

¹ After this decision, the town of Montpelier and its selectmen, in behalf of themselves and the other inhabitants, brought a bill in equity against East Montpelier and its selectmen, as properly representing the interests of all the inhabitants of that town; and prayed that a trustee might be appointed to take charge of the lands and rents held by the old town in trust. The court decided that the prayer should be granted and a trustee appointed, as if the original trustee had been a natural person and had died. *Montpelier v. East Montpelier*, 29 Vt. 12.

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